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Supreme Court, U.S.  
FILED  
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No. 98-1288

In The  
**Supreme Court of the United States**

VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of the VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of the VILLAGE OF WILLOWBROOK,

*Petitioners,*

v.

GRACE OLECH,

*Respondent.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Seventh Circuit

JOINT APPENDIX

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**Petition For Certiorari Filed February 9, 1999  
Certiorari Granted September 28, 1999**

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**Relevant Docket Entries**

**VILLAGE OF WILLOWBROOK, et. al. v. GRACE OLECH**  
**No. 98-1288**

<u>Date</u>	<u>Proceedings</u>
	United States District Court, N.D. Illinois Case No. 97 C 4935
7/11/97	Complaint, including jury demand, filed.
9/3/97	Motion to Dismiss for Failure to State a Cause of Action filed.
9/3/97	Memorandum of Law in Support of Motion to Dismiss filed.
9/10/97	Order entered giving Plaintiff to October 8, 1997, to file an Amended Complaint.
10/8/97	Amended Complaint, including jury demand, filed.
10/28/97	Motion to Dismiss Plaintiff's Amended Complaint filed.
10/28/97	Memorandum of Law in Support of Motion to Dismiss filed.
11/21/97	Motion by Defendants for leave to substitute as attorney of record filed.
11/26/97	Order entered granting leave to substitute as attorney of record. James DeAno and Christy Benton granted leave to file appearance as counsel of record for Defendants.
12/19/97	Plaintiff's Response to Defendants' Motion to Dismiss the Amended Complaint filed.
1/9/98	Reply filed.

4/13/98 Memorandum Opinion and Order granting Defendants' Motion to Dismiss.

4/13/98 Minute Order entered granting Defendants' Motion to Dismiss.

4/13/98 Judgment in a Civil Case issued dismissing action in its entirety.

5/13/98 Notice of Appeal by Grace Olech filed.

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United States Court of Appeals for the  
Seventh Circuit  
Case No. 98-2235

7/29/98 Brief of Plaintiff-Appellant Grace Olech filed.

8/27/98 Brief of the Defendants-Appellees filed.

9/11/98 Reply Brief of Plaintiff-Appellant Grace Olech filed.

10/8/98 Oral argument.

11/12/98 Opinion reversing Judgment and Order granting Defendants' Motion to Dismiss.

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Supreme Court of the United States  
October Term, 1998  
Case No. 98-1288

2/9/99 Petition for a Writ of Certiorari filed.

5/26/99 Respondent's Brief in Opposition to the Petition for a Writ of Certiorari filed.

9/28/99 Order granting Petition for a Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRACE OLECH,	)	No. 97 C 4935
Plaintiff,	)	Judge Marovich
-vs-	)	Magistrate Judge Keys
VILLAGE OF	)	Plaintiff Demands
WILLOWBROOK, an	)	Trial By Jury
Illinois municipal	)	
corporation, GARY	)	
PRETZER, individually	)	
and as President of	)	
Defendant VILLAGE OF	)	
WILLOWBROOK, and	)	
PHILIP J. MODAFF,	)	
individually and as	)	
Director of Public Services	)	
of Defendant VILLAGE	)	
OF WILLOWBROOK,	)	
Defendants.	)	

AMENDED COMPLAINT

(42 U.S.C. § 1983)

(Received Oct. 08, 1997)

NOW COMES Plaintiff GRACE OLECH, by and through her attorney, JOHN R. WIMMER, and complaining of the Defendants, VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, alleges and states as follows:

1. That Plaintiff GRACE OLECH has brought this action to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution.

2. That jurisdiction over this action has been conferred upon this Court under 28 U.S.C. § 1331 and § 1334, and 42 U.S.C. § 1983.

3. That Plaintiff GRACE OLECH is, and at all times hereinmentioned was, a citizen of the United States and a resident of Willowbrook, DuPage County, Illinois, and Plaintiff GRACE OLECH is the mother of Phyllis S. Zimmer who is mentioned hereinafter.

4. That Defendant VILLAGE OF WILLOWBROOK is, and at all times hereinmentioned was, a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois.

5. That Defendant GARY PRETZER is an individual who is President of Defendant VILLAGE OF WILLOWBROOK and was President of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

6. That Defendant PHILIP J. MODAFF is an individual who was Director of Public Services of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

7. That on August 8, 1989, Plaintiff GRACE OLECH and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Defendant VILLAGE OF WILLOWBROOK and others in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 (hereinafter "the state court lawsuit"), in which the plaintiffs sought money damages from Defendant VILLAGE OF WILLOWBROOK and others as a result of the flooding of the plaintiffs' property, including what is hereinafter referred to as the Olech property, by stormwater.

8. That Howard Brinkman's claims in the state court case were dismissed for want of prosecution on April 1, 1991.

9. That the claim of Plaintiff GRACE OLECH and Thaddeus Olech against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Plaintiff GRACE OLECH, individually and as special administrator of the estate of Thaddeus Olech, and against Defendant VILLAGE OF WILLOWBROOK in the amount of \$20,000.00, and judgment was entered on that verdict.

10. That the claim of Rodney C. Zimmer and Phyllis S. Zimmer against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Rodney C. Zimmer and Phyllis S. Zimmer and against Defendant VILLAGE OF WILLOWBROOK in the amount of \$135,000.00, and judgment was entered on that verdict.

11. That the state court lawsuit against Defendant VILLAGE OF WILLOWBROOK, which was ultimately determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Defendant VILLAGE OF WILLOWBROOK, and generated substantial ill will on the part of Defendant VILLAGE OF WILLOWBROOK and its officers and employees, including PHILIP J. MODAFF and, on information and belief, Defendant GARY PRETZER toward the plaintiffs in the state court lawsuit.

12. That, on information and belief, said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Defendant VILLAGE OF WILLOWBROOK and its officers and employees look bad; the erroneous belief on the part of officers and employees of Defendant VILLAGE OF WILLOWBROOK that the state court lawsuit was frivolous and meritless; and the fact that, prior to the filing of the state court lawsuit, Plaintiff GRACE OLECH and Thaddeus Olech, and Howard Brinkman had refused to grant certain drainage easements for a stormwater drainage project favored by Defendant VILLAGE OF WILLOWBROOK.

13. That, from a time long prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on or about November 24, 1996, Plaintiff GRACE OLECH and Thaddeus Olech resided in a single-family home on, and were the joint owners of, certain property commonly known as 6440 Tennessee Avenue, Willowbrook, Illinois 60514 (hereinafter referred to as "the Olech property") and legally described as follows:

"The East half of the North half of the South half of the Southwest quarter of the Northeast quarter of the Northeast quarter of Section 22, Township 38 North, Range 11, East of the Third Principal Meridian in DuPage County, Illinois."

14. That, since the death of Thaddeus Olech, Plaintiff GRACE OLECH has been the sole owner of the Olech property and has continued to reside thereon.

15. That in the spring of 1995 the private well on the Olech property, which had theretofore provided potable water for the Olech home, broke down and was beyond repair.

16. That Plaintiff GRACE OLECH and Thaddeus Olech then and there implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney C. Zimmer and Phyllis S. Zimmer, via an overground hose.

17. That at that time the water main of Defendant VILLAGE OF WILLOWBROOK on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of Plaintiff GRACE OLECH and Thaddeus Olech.

18. That by the spring of 1995 Defendant VILLAGE OF WILLOWBROOK had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue who were not hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK to hook up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

19. That on or about May 23, 1995, and while the state court lawsuit was pending, Plaintiff GRACE OLECH and Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, made a request to Defendant VILLAGE OF WILLOWBROOK that their homes be hooked up right away to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK, and at or about that time Defendant PHILIP J. MODAFF was informed that the well on the Olech property had broken down and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing.

20. That, as required by law, Defendant VILLAGE OF WILLOWBROOK undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each parcel of property involved of one-third of the estimated cost of the project.

21. That on or about July 11, 1995, Plaintiff GRACE OLECH and Thaddeus Olech paid to Defendant VILLAGE OF WILLOWBROOK \$7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Defendant VILLAGE OF WILLOWBROOK had received the required payments from Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer.

22. That the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property of Rodney C. Zimmer and Phyllis S. Zimmer is not, and never has been, a dedicated

public street, and, on information and belief, no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property owned by Rodney C. Zimmer and Phyllis S. Zimmer.

23. That in August of 1995 Defendant PHILIP J. MODAFF told Phyllis S. Zimmer that Defendant VILLAGE OF WILLOWBROOK would not proceed with the project unless all of the property owners involved granted Defendant VILLAGE OF WILLOWBROOK a 33-foot easement along Tennessee Avenue.

24. That in August of 1995 Defendant GARY PRETZER told Phyllis Zimmer that the 33-foot easement would be required for the project.

25. That on or about September 21, 1995, Defendant PHILIP J. MODAFF sent to Plaintiff GRACE OLECH and Thaddeus Olech and to other property owners involved a Plat of Easement whereby they and property owners on the other side of Tennessee Avenue would each dedicate a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street.

26. That the demands of the Defendants for 33-foot easements and a 66-foot dedicated public street as a condition of the extension of the water main were not consistent with the policy of Defendant VILLAGE OF WILLOWBROOK regarding other property in the Village

of Willowbrook; as was ultimately admitted by the Village Attorney, Gerald M. Gorski, in a letter dated November 10, 1995, "[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

27. That the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.

28. That the decision by the Defendants to treat Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot street dedication as a condition for the extension of the water main was irrational and wholly arbitrary, and, on information and belief, was made by the appropriate policy-making official or employee of Defendant VILLAGE OF WILLOWBROOK.

29. That, because the 33-foot easements and the 66-foot dedicated street demanded by the Defendants were

not consistent with what the Defendants required in relation to other property in the Village of Willowbrook, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication.

30. That from the time that Defendant PHILIP J. MODAFF first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project.

31. That on or about November 10, 1995, Defendant VILLAGE OF WILLOWBROOK withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Defendant VILLAGE OF WILLOWBROOK were granted a 15-foot easement for the water main and for the related water service lines used to connect to the homes.

32. That the easement demanded by Defendant VILLAGE OF WILLOWBROOK in its attorney's letter of November 10, 1995, was consistent with what was required by Defendant VILLAGE OF WILLOWBROOK in relation to other property in the Village of Willowbrook, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved, agreed to grant said easement.

33. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather.

34. That in November of 1995 the overground hose used by Plaintiff GRACE OLECH and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech were without running water from November of 1995 until the project was completed on or about March 19, 1996.

35. That as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress.

36. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and 66-foot street dedication and the concomitant and resulting delay in the project deprived Plaintiff GRACE OLECH of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Defendants in that regard were undertaken either with the intent to deprive Plaintiff GRACE OLECH and others of said rights, or in reckless disregard of said rights.

37. That the actions and inactions of the Defendants set forth above were undertaken under color of state law.

WHEREFORE, Plaintiff GRACE OLECH prays that this Court:

- (a) Award Plaintiff GRACE OLECH compensatory damages in an amount to be determined by the trier of fact;
- (b) Award Plaintiff GRACE OLECH punitive damages in an amount to be determined by the trier of fact;
- (c) Award Plaintiff GRACE OLECH her reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988; and
- (d) Grant Plaintiff GRACE OLECH such other and further relief as is proper and just in the premises.

GRACE OLECH

By: /s/ John R. Wimmer  
Attorney for the Plaintiff

JOHN R. WIMMER  
Attorney at Law  
928 Warren Avenue  
Downers Grove, Illinois 60515  
(630) 810-0005  
Attorney No. 03125600

---

**IN THE  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

GRACE OLECH,	)
	<i>Plaintiff,</i> )
vs.	)
VILLAGE OF WILLOWBROOK,	)
an Illinois Municipal Corporation,	)
GARY PRETZER, Individually	)
and as President of Defendant	)
VILLAGE OF WILLOWBROOK,	)
and PHILIP J. MODAFF,	)
Individually and as Director of	)
Public Services for Defendant	)
VILLAGE OF WILLOWBROOK,	)
<i>Defendants.</i>	)

**MOTION TO DISMISS  
PLAINTIFF'S AMENDED COMPLAINT**

(Received Oct. 28, 1997)

NOW COME the Defendants, the Village of Willowbrook, Gary Pretzer and Philip J. Modaff, by their attorneys, Robert C. Yelton III and Jeffrey Edward Kehl of Dowd & Dowd, Ltd., and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, move this court to dismiss the Plaintiff's Complaint for failure to state a cause of action upon which relief may be granted. For this Motion, the Defendants would show this court as follows:

1. On October 8, 1997, the Plaintiff caused her one count Amended Complaint to be filed against the Village

of Willowbrook and two of its employees, Gary Pretzer and Philip J. Modaff. (A copy of the Plaintiff's Amended Complaint is attached hereto and incorporated herein as Exhibit A).

2. The Plaintiff seeks relief under 42 U.S.C. §1983 for what the Plaintiff alleges to be a violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Plaintiff's Amended Complaint, ¶1).

3. As more specifically submitted in the Defendants' Memorandum of Law in Support of Motion to Dismiss filed contemporaneously herewith, the Defendants contend that the Plaintiff has failed to state a cause of action upon which relief may be granted because she has not alleged discrimination based upon her exercise of constitutional rights.

WHEREFORE, the Defendants respectfully request this court to enter an order dismissing the Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Robert C. Yelton III  
Jeffrey Edward Kehl  
DOWD & DOWD, LTD.  
55 West Wacker Drive,  
Suite 1000  
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(312) 704-4400  
Counsel for the Defendants

Dowd & Dowd, Ltd.  
*/s/ Jeffrey Edward Kehl*  
Jeffrey Edward Kehl  
One of the Attorneys  
for the Defendants

## EXHIBIT A

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRACE OLECH,	)	No. 97 C 4935
Plaintiff,	)	Judge Marovich
-vs-	)	Magistrate Judge Keys
VILLAGE OF	)	Plaintiff Demands
WILLOWBROOK, an	)	Trial By Jury
Illinois municipal	)	
corporation, GARY	)	
PRETZER, individually	)	
and as President of	)	
Defendant VILLAGE OF	)	
WILLOWBROOK, and	)	
PHILIP J. MODAFF,	)	
individually and as	)	
Director of Public Services	)	
of Defendant VILLAGE	)	
OF WILLOWBROOK,	)	
Defendants.	)	

AMENDED COMPLAINT

(42 U.S.C. § 1983)

NOW COMES Plaintiff GRACE OLECH, by and through her attorney, JOHN R. WIMMER, and complaining of the Defendants, VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF

WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, alleges and states as follows:

1. That Plaintiff GRACE OLECH has brought this action to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution.
2. That jurisdiction over this action has been conferred upon this Court under 28 U.S.C. § 1331 and § 1334, and 42 U.S.C. § 1983.
3. That Plaintiff GRACE OLECH is, and at all times hereinmentioned was, a citizen of the United States and a resident of Willowbrook, DuPage County, Illinois, and Plaintiff GRACE OLECH is the mother of Phyllis S. Zimmer who is mentioned hereinafter.
4. That Defendant VILLAGE OF WILLOWBROOK is, and at all times hereinmentioned was, a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois.
5. That Defendant GARY PRETZER is an individual who is President of Defendant VILLAGE OF WILLOWBROOK and was President of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.
6. That Defendant PHILIP J. MODAFF is an individual who was Director of Public Services of Defendant

VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

7. That on August 8, 1989, Plaintiff GRACE OLECH and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Defendant VILLAGE OF WILLOWBROOK and others in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 (hereinafter "the state court lawsuit"), in which the plaintiffs sought money damages from Defendant VILLAGE OF WILLOWBROOK and others as a result of the flooding of the plaintiffs' property, including what is hereinafter referred to as the Olech property, by stormwater.

8. That Howard Brinkman's claims in the state court case were dismissed for want of prosecution on April 1, 1991.

9. That the claim of Plaintiff GRACE OLECH and Thaddeus Olech against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Plaintiff GRACE OLECH, individually and as special administrator of the estate of Thaddeus Olech, and against Defendant VILLAGE OF WILLOWBROOK in the amount of \$20,000.00, and judgment was entered on that verdict.

10. That the claim of Rodney C. Zimmer and Phyllis S. Zimmer against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury

which, on February 11, 1997, returned a verdict in favor of Rodney C. Zimmer and Phyllis S. Zimmer and against Defendant VILLAGE OF WILLOWBROOK in the amount of \$135,000.00, and judgment was entered on that verdict.

11. That the state court lawsuit against Defendant VILLAGE OF WILLOWBROOK, which was ultimately determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Defendant VILLAGE OF WILLOWBROOK, and generated substantial ill will on the part of Defendant VILLAGE OF WILLOWBROOK and its officers and employees, including PHILIP J. MODAFF and, on information and belief, Defendant GARY PRETZER toward the plaintiffs in the state court lawsuit.

12. That, on information and belief, said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Defendant VILLAGE OF WILLOWBROOK and its officers and employees look bad; the erroneous belief on the part of officers and employees of Defendant VILLAGE OF WILLOWBROOK that the state court lawsuit was frivolous and meritless; and the fact that, prior to the filing of the state court lawsuit, Plaintiff GRACE OLECH and Thaddeus Olech, and Howard Brinkman had refused to grant certain drainage easements for a stormwater drainage project favored by Defendant VILLAGE OF WILLOWBROOK.

13. That, from a time long prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on or about November 24, 1996, Plaintiff GRACE OLECH and Thaddeus Olech resided in a single-family home on,

and were the joint owners of, certain property commonly known as 6440 Tennessee Avenue, Willowbrook, Illinois 60514 (hereinafter referred to as "the Olech property") and legally described as follows:

"The East half of the North half of the South half of the Southwest quarter of the Northeast quarter of the Northeast quarter of Section 22, Township 38 North, Range 11, East of the Third Principal Meridian in DuPage County, Illinois."

14. That, since the death of Thaddeus Olech, Plaintiff GRACE OLECH has been the sole owner of the Olech property and has continued to reside thereon.

15. That in the spring of 1995 the private well on the Olech property, which had theretofore provided potable water for the Olech home, broke down and was beyond repair.

16. That Plaintiff GRACE OLECH and Thaddeus Olech then and there implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney C. Zimmer and Phyllis S. Zimmer, via an overground hose.

17. That at that time the water main of Defendant VILLAGE OF WILLOWBROOK on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of Plaintiff GRACE OLECH and Thaddeus Olech.

18. That by the spring of 1995 Defendant VILLAGE OF WILLOWBROOK had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on

Tennessee Avenue who were not hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK to hook up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

19. That on or about May 23, 1995, and while the state court lawsuit was pending, Plaintiff GRACE OLECH and Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, made a request to Defendant VILLAGE OF WILLOWBROOK that their homes be hooked up right away to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK, and at or about that time Defendant PHILIP J. MODAFF was informed that the well on the Olech property had broken down and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing.

20. That, as required by law, Defendant VILLAGE OF WILLOWBROOK undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each parcel of property involved of one-third of the estimated cost of the project.

21. That on or about July 11, 1995, Plaintiff GRACE OLECH and Thaddeus Olech paid to Defendant VILLAGE OF WILLOWBROOK \$7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Defendant VILLAGE OF WILLOWBROOK had received the required payments from Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer.

22. That the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property of Rodney C. Zimmer and Phyllis S. Zimmer is not, and never has been, a dedicated public street, and, on information and belief, no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property owned by Rodney C. Zimmer and Phyllis S. Zimmer.

23. That in August of 1995 Defendant PHILIP J. MODAFF told Phyllis S. Zimmer that Defendant VILLAGE OF WILLOWBROOK would not proceed with the project unless all of the property owners involved granted Defendant VILLAGE OF WILLOWBROOK a 33-foot easement along Tennessee Avenue.

24. That in August of 1995 Defendant GARY PRETZER told Phyllis Zimmer that the 33-foot easement would be required for the project.

25. That on or about September 21, 1995, Defendant PHILIP J. MODAFF sent to Plaintiff GRACE OLECH and Thaddeus Olech and to other property owners involved a Plat of Easement whereby they and property owners on the other side of Tennessee Avenue would each dedicate a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street.

26. That the demands of the Defendants for 33-foot easements and a 66-foot dedicated public street as a

condition of the extension of the water main were not consistent with the policy of Defendant VILLAGE OF WILLOWBROOK regarding other property in the Village of Willowbrook; as was ultimately admitted by the Village Attorney, Gerald M. Gorski, in a letter dated November 10, 1995, "[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

27. That the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.

28. That the decision by the Defendants to treat Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot street dedication as a condition for the extension of the water main was irrational and wholly arbitrary, and, on information and belief, was made by the appropriate policy-making official or employee of Defendant VILLAGE OF WILLOWBROOK.

29. That, because the 33-foot easements and the 66-foot dedicated street demanded by the Defendants were not consistent with what the Defendants required in relation to other property in the Village of Willowbrook, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication.

30. That from the time that Defendant PHILIP J. MODAFF first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project.

31. That on or about November 10, 1995, Defendant VILLAGE OF WILLOWBROOK withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Defendant VILLAGE OF WILLOWBROOK were granted a 15-foot easement for the water main and for the related water service lines used to connect to the homes.

32. That the easement demanded by Defendant VILLAGE OF WILLOWBROOK in its attorney's letter of November 10, 1995, was consistent with what was required by Defendant VILLAGE OF WILLOWBROOK in relation to other property in the Village of Willowbrook, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved, agreed to grant said easement.

33. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project

of approximately three months, a delay which proved critical as a result of the approaching winter weather.

34. That in November of 1995 the overground hose used by Plaintiff GRACE OLECH and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech were without running water from November of 1995 until the project was completed on or about March 19, 1996.

35. That as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress.

36. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and 66-foot street dedication and the concomitant and resulting delay in the project deprived Plaintiff GRACE OLECH of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Defendants in that regard were undertaken either with the intent to deprive Plaintiff GRACE OLECH and others of said rights, or in reckless disregard of said rights.

37. That the actions and inactions of the Defendants set forth above were undertaken under color of state law.

WHEREFORE, Plaintiff GRACE OLECH prays that this Court:

- (a) Award Plaintiff GRACE OLECH compensatory damages in an amount to be determined by the trier of fact;
- (b) Award Plaintiff GRACE OLECH punitive damages in an amount to be determined by the trier of fact;
- (c) Award Plaintiff GRACE OLECH her reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988; and
- (d) Grant Plaintiff GRACE OLECH such other and further relief as is proper and just in the premises.

GRACE OLECH

By: /s/ John R. Wimmer  
Attorney for the Plaintiff

JOHN R. WIMMER  
Attorney at Law  
928 Warren Avenue  
Downers Grove, Illinois 60515  
(630) 810-0005  
Attorney No. 03125600

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IN THE  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRACE OLECH,	)
<i>Plaintiff,</i>	)
vs.	)
VILLAGE OF	)
WILLOWBROOK, an	)
Illinois Municipal	)
Corporation, GARY	)
PRETZER, Individually	)
and as President of	)
Defendant VILLAGE OF	)
WILLOWBROOK, and	)
PHILIP J. MODAFF,	)
Individually and as	)
Director of Public	)
Services for Defendant	)
VILLAGE OF	)
WILLOWBROOK,	)
<i>Defendants.</i>	)

MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS

(Received Oct. 28, 1997)

NOW COME the Defendants, the Village of Willowbrook, Gary Pretzer, and Philip J. Modaff, by their attorneys, Robert C. Yelton III and Jeffrey Edward Kehl of Dowd & Dowd, Ltd., and submit the following matters for the court's consideration in ruling on the Defendants' Motion to Dismiss the Plaintiff's Amended Complaint.

### Preface

The Plaintiff's Amended Complaint seeks relief under 42 U.S.C. §1983 for what the Plaintiff perceives to be a violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Defendants have filed a Motion to Dismiss because the Amended Complaint fails to state a cause of action upon which relief may be granted. As will be demonstrated below, the facts alleged by the Plaintiff do not support the conclusion that the Defendants violated her right to equal protection under the laws of this State. As such, no remedy is available to the Plaintiff under 42 U.S.C. §1983.

### Standard of Review

In considering a Motion to Dismiss, this court is obligated to view all factual allegations in the light most favorable to the Plaintiff. A motion to dismiss will not be granted unless it appears from the complaint that the Plaintiff can prove no set of facts to support her claims that would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 954 (7th Cir. 1989). To this end, all well-pleaded facts are taken as true. *City of Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976).

This does not mean, however, that extensive factual allegations or even a factual dispute will immunize a complaint from dismissal under Rule 12(b)(6). Rather, even with all facts being accepted by the court, the Plaintiff must still present a cause of action as a matter of law.

*Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 433 (7th Cir. 1978).

More importantly, this court is not "to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported conclusions of law." *D'City National Bank v. Checker, Simon & Rosner*, 32 F.3d 277, 281 (7th Cir. 1994) (quoting *Dimming v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993)).

### Factual Background

The Amended Complaint alleges that prior to the Spring of 1995, the Village of Willowbrook developed a plan under which all houses along Tennessee Avenue in Willowbrook were to be hooked up to the Village's water system. The plan was to be implemented within two years of the Spring of 1995. (Amended Complaint, ¶ 18). As part of this two-year plan, homeowners could be connected to the Village water system only if they paid one-third of the total cost for the connection. (Amended Complaint, ¶ 20). In addition, homeowners on both sides of Tennessee Avenue would be required to grant a 33 foot easement to the Village. (Amended Complaint, ¶ 25).

According to the Plaintiff, in the Spring of 1995, the private well servicing her residence at 6440 Tennessee Avenue in Willowbrook, Illinois broke down. (Amended Complaint, ¶ 17). In order to have water available in her house, the Plaintiff had a garden hose run from her neighbor's house to hers. (Amended Complaint, ¶ 16).

On May 23, 1995, the Plaintiff and her adjoining neighbors, the Zimmers and the Brinkmans, made a written request to the Village to have their residences connected to the Village's water system "right away." (Amended Complaint, ¶ 19). Nearly two months later, on July 11, 1995, the Plaintiff paid the Village her share of the cost for the proposed connection under the two-year plan. (Amended Complaint, ¶ 21). The Plaintiff's adjoining neighbors, the Brinkmans and the Zimmers paid shortly thereafter. (Amended Complaint, ¶ 21). The Plaintiff makes no mention of when the homeowners on the other side of Tennessee Avenue paid their shares, if ever.

The Plaintiff claims that notice of the proposed 33 foot easement was not given to her neighbor until August 1995. (Amended Complaint, ¶¶ 23-24). Written notice was sent to the Plaintiff in September of that year. (Amended Complaint, ¶ 25). In any event, the Plaintiff alleges that the demand for a 33 foot easement was not acceptable to her. As such, she and some of the other property owners refused to grant the Village the requested easement. (Amended Complaint, ¶ 29).

Subsequently, on November 10, 1995, the Village sent a letter to the Plaintiff which apparently indicated that a street dedication was not necessary to complete the job but that a temporary construction easement and a permanent easement of fifteen feet would be required. According to the Amended Complaint, a letter from the Village Attorney indicated that a 15 foot easement would be consistent with Village policy regarding all other property in the Village. (Amended Complaint, ¶ 26).

The Plaintiff alleges that because the fifteen foot easement was consistent with requirements for other properties in the Village, she and other property owners agreed to grant the required easement. The Plaintiff does not allege that all affected property owners granted the easement, or if so, when. (Amended Complaint, ¶ 32).

In November, 1995 the hose running from to [sic] the Plaintiff's house broke, leaving her with no running water until the two-year project was completed on March 19, 1996. (Amended Complaint, ¶ 34). The Plaintiff does not explain why a new hose was not implemented, why she never had her well fixed, or how the lack of running water in late 1995 differed from her predicament in the Spring of 1995.

In any event, the Plaintiff claims that "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless [the Village] was granted the 33-foot easement and the 66-foot street dedication, [the Plaintiff was] without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress." (Amended Complaint, ¶ 35).

For her action, the Plaintiff maintains that the initial refusal to proceed without a 33 foot easement and the three-month delay before a 15-foot easement was required deprived her of her rights under the Equal Protection Clause of the Fourteenth Amendment. (Amended Complaint, ¶ 36). Specifically, the Plaintiff claims that the refusal to proceed without a 33-foot easement was prompted by "ill will" on the part of the Defendants

because the Plaintiff, the Zimmers, and Howard Brinkman had filed a lawsuit against the Village. (Amended Complaint, ¶¶ 11-12). However, as the Plaintiff concedes, the action brought by Mr. Brinkman had been dismissed in 1991, and the Plaintiff's own action, viewed as frivolous by the Village in 1995, did not result in a judgment in favor of the Plaintiff until 1997. (Amended Complaint, ¶¶ 7-10).

The Plaintiff does not explain how the alleged "ill will" harbored by the Village toward the Plaintiff, Zimmers, and Mr. Brinkman manifested itself other than by the requirement that the homeowners grant a 33-foot easement. The fact that the 33-foot easement was also required of property owners on the other side of Tennessee Avenue, (Amended Complaint, ¶ 25) who had not sued the Village and for whom there are no allegations of "ill will" is, as discussed below, most destructive to the Plaintiff's claim.

#### **Argument**

##### **The Plaintiff Fails to Allege a Cause of Action under §1983 for any Violation of her Rights Under the Equal Protection Clause of the Fourteenth Amendment.**

The Plaintiff seeks to impose §1983 liability on the Defendants under what has been colloquially known as "Category Three" discrimination. Within the general rubric of equal protection law, a plaintiff must show disparate treatment based on membership in a vulnerable group, racial or otherwise, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41, 105 S.Ct. 3249,

3254-55, 87 L.Ed.2d 313 (1985), or based upon the application of laws or policies which make irrational distinctions. *Lindsey v. Normet*, 405 U.S. 56, 74-79, 92 S.Ct. 862, 874-77, 31 L.Ed.2d 36 (1972). "Category Three" discrimination, however, occurs where "a powerful public official picked on a person out of sheer vindictiveness," and where there is "an orchestrated campaign of official harassment" directed at the individual "out of sheer malice." *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995).

The Plaintiff, by including many allegations regarding the state court action she and others brought against the Village, and by alleging that that lawsuit created "ill will" on the part of the Defendants, seeks to hawk this otherwise federally insignificant series of events as a matter of great constitutional import. The Defendants submit that this case has no business being in federal court for two reasons. First, the allegations do not sufficiently plead malice on the part of the Defendants. Second, the allegations of the Amended Complaint establish that the Plaintiff was treated no differently than homeowners against whom the Village harbored no "ill will."

##### **1. The Amended Complaint Lacks Sufficient Allegations of Malice on the Part of the Defendants.**

As indicated above, "Category Three" discrimination requires facts [sic] which establish "an orchestrated campaign of official harassment" directed at the individual "out of sheer malice." *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). All the Plaintiff can muster here is allegations that the Defendants harbored "ill will" against the Plaintiff because of her prior lawsuit. No facts are set

forth that show any "orchestrated campaign" or any ugly motive approaching "malice." Unless the Plaintiff can paint a more evil picture of the Defendants, her action should be dismissed for failure to state a cause of action upon which relief may be granted.

**2. The Plaintiff Has Pled Herself Out of an Action By Alleging that Other Homeowners Were Asked to Grant a 33-Foot Easement.**

The Plaintiff claims that her right to equal protection was violated by the Village because the Village wanted her to grant a 33-foot easement only because she had filed a state court action against the Village. This argument is defeated by the Plaintiff's own allegations.

The Plaintiff has alleged that the Village wanted all homeowners along *both sides* of Tennessee Avenue to grant a 33-foot easement. (Amended Complaint, ¶ 25). The Plaintiff, the Zimmers, and Mr. Brinkman all lived on one side of Tennessee Avenue. (Amended Complaint, ¶ 17). No one from the other side of Tennessee Avenue is alleged to have filed a state court action which caused "ill will" on the part of the Defendants.

Distilled to its finest essence, the Plaintiff's Amended Complaint states that the Plaintiff and her neighbors were all required to grant a 33-foot easement, regardless of whether they had filed a lawsuit against the Village. All homeowners along Tennessee Avenue were treated identically. As such, the Plaintiff could not possibly have been the victim of "sheer malice" or "vindictiveness" on the part of the Defendants.

The Equal Protection Clause cannot be construed as a means by which the Plaintiff may bring her whining before this court. Despite having filed a state court action against the Village, she was treated identically with those individuals who had not. In fact, the Amended Complaint shows that the two-year project was completed (as far as the Plaintiff was concerned) within a year. While the Plaintiff may have remained inconvenienced by her broken well and lack of potable water for longer than she wanted, this does not amount to a constitutional injury. As Judge Posner noted, "[t]he concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review by federal courts." *Indiana State Teachers Assn. v. Board of School Comm'rs of the City of Indianapolis*, 1010 F.3d 1179, 1181 (7th Cir. 1996).

**Conclusion**

For the foregoing reasons, the Defendants request this court to grant their Motion to Dismiss the Plaintiff's Amended Complaint.

Dowd & Dowd, Ltd.

/s/ Jeffrey Edward Kehl

Jeffrey Edward Kehl

One of the Attorneys for the Defendants

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 Counsel for the Defendants

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRACE OLECH,	)
Plaintiff,	)
-vs-	) No. 97 C 4935
VILLAGE OF WILLOWBROOK,	)
an Illinois municipal	)
corporation, GARY PRETZER,	) Judge Marovich
individually and as President	) Magistrate Judge
of Defendant VILLAGE OF	) Keys
WILLOWBROOK, and PHILIP	)
J. MODAFF, individually and	)
as Director of Public Services	)
of Defendant VILLAGE OF	)
WILLOWBROOK,	)
Defendants.	)

PLAINTIFF'S RESPONSE TO DEFENDANTS'  
MOTION TO DISMISS THE AMENDED COMPLAINT

(Received Dec. 19, 1997)

NOW COMES the Plaintiff, GRACE OLECH, by and through her attorney, JOHN R. WIMMER, and submits this response to the Defendants' motion to dismiss the amended complaint.

STANDARD OF REVIEW

The Defendants' motion to dismiss the amended complaint has been brought under Fed.R.Civ.P. 12(b)(6). As stated in *Carl A. Haas Automobile Imports, Inc. v. Lola Cars Ltd.* (N.D.Ill. 1996), 933 F.Supp. 1381, 1384, "Familiar Rule 12(b)(6) principles require this Court to accept as

true the Complaint's well-pleaded factual allegations, together with all reasonable inferences in [plaintiff's] favor [citation omitted]"; and "[d]ismissal is appropriate only if it appears beyond doubt that [plaintiff] can prove no set of facts, consistent with the Complaint's allegations that would entitle it to relief [citation omitted]."

STATEMENT OF FACTS

According to the amended complaint, the Plaintiff, GRACE OLECH (hereinafter sometimes referred to as "Mrs. Olech"), is a resident of Willowbrook. (Par. 3) On August 8, 1989, Mrs. Olech and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Defendant VILLAGE OF WILLOWBROOK (hereinafter sometimes referred to as "Willowbrook") and others in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 (hereinafter sometimes referred to as "the state court lawsuit"), in which the plaintiffs sought money damages from Willowbrook and other defendants as a result of the flooding of the plaintiffs' property by stormwater. (Par. 7) Howard Brinkman's claims in the state court lawsuit were dismissed for want of prosecution on April 1, 1991. (Par. 8) The claim of Mrs. Olech and her husband against Willowbrook was tried to a jury which, on February 11, 1997, returned a verdict in favor of Mrs. Olech, individually and as special administrator for her husband, in the amount of \$20,000.00, and judgment was entered on that verdict. (Par. 9) The claim of Rodney C. Zimmer and Phyllis S. Zimmer against Willowbrook was tried to the same jury which, on February

11, 1997, returned a verdict in favor of the Zimmers in the amount of \$135,000.00, and judgment was entered on that verdict. (Par. 10) The state court lawsuit generated substantial ill will on the part of Willowbrook and its officers and agents including Defendants GARY PRETZER (hereinafter sometimes referred to as "Pretzer") and PHILIP J. MODAFF (hereinafter sometimes referred to as "Modaff") against the plaintiffs in that case. (Par. 11) The ill will resulted from the coverage of the state court lawsuit in the local press which made Willowbrook and its officers and employees look bad, from the erroneous belief that the state court lawsuit was frivolous, and from the fact that, prior to the filing of the state court lawsuit, Mrs. Olech and her husband, and Howard Brinkman had refused to grant certain easements for a stormwater drainage project favored by Willowbrook. (Par. 12)

In the spring of 1995 the private well on the Olech property on the west side of Tennessee Avenue broke down and *was beyond repair*. (Par. 15) Mrs. Olech and her husband implemented a temporary solution to the problem by hooking up to the well of their neighbor's to the south on Tennessee Avenue, the Zimmers, via an overground hose. (Par. 16) Mrs. Olech is Phyllis Zimmer's mother. (Par. 3)

At that time Willowbrook's water main extended as far south as the northern boundary of the property of Howard Brinkman, the Olech's neighbor to the north on Tennessee Avenue. (Par. 17) By the spring of 1995 Willowbrook had developed a plan (hereinafter sometimes referred to as "Willowbrook's 2-year plan") which was to be implemented within two years of the spring of 1995, and which was going to require all of the homeowners on

Tennessee Avenue who were not hooked up to Willowbrook's municipal water supply system to hook up to the system. (Par. 18) In Defendants' memorandum in support of their motion to dismiss, the Defendants' make the following false and misleading statements:

"As part of this two-year plan, homeowners could be connected to the Village water system only if they paid one-third of the total cost for the connection. (Amended Complaint, [Par.] 20). In addition, homeowners on both sides of Tennessee Avenue would be required to grant a 33 foot easement to the Village.

(Amended Complaint, [Par.] 25)."

(Defendant's Memorandum, p. 3.)

Actually, those statements do not appear in the amended complaint. The work that was ultimately done by Willowbrook was not done pursuant to Willowbrook's two-year plan, but rather at the request of the Olechs, the Zimmers, and Mr. Brinkman for an extension of the water main "right away." (Par. 19) The amended complaint does not allege that the costs paid were assessed or that the easements were demanded pursuant to Willowbrook's 2-year plan.

On May 23, 1995, while the state court lawsuit was pending, the Olechs, the Zimmers, and Howard Brinkman made a request to Willowbrook that their homes be hooked up "right away" to the municipal water supply system. (Par. 19) At that time Modaff was informed that the well on the Olech property had broken down, and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, *a temporary*

*solution which would not work in the winter when the temperature fell below freezing.* (Par. 19) As required by law, Willowbrook undertook to extend the water main and hook up the homes as requested, conditioned on the payment by each of the homeowners, the Olechs, the Zimmers, and Mr. Brinkman, of one-third of the estimated total cost of the project. (Par. 20) On July 11, 1995, the Olechs paid Willowbrook \$7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Willowbrook had received the required payments from the Zimmers and Mr. Brinkman. (Par. 21)

In the Defendants' memorandum in support of their motion to dismiss, the Defendants state that these moneys were paid "under the two-year plan," and that "[t]he Plaintiff makes no mention of when the homeowners on the other side of Tennessee Avenue paid their shares." (Defendants' Memorandum, p. 4.) The Defendants statements are again false and misleading. The money was not paid, nor was the work done "under the two-year plan." The work was undertaken at the request of the Olechs, the Zimmers, and Mr. Brinkman for connection "right away" to the municipal water system, and not as part of Willowbrook's two-year plan, and the amended complaint does not allege to the contrary. And the Plaintiff made no mention of when the homeowners on the other side of Tennessee Avenue paid their shares because *there are no homes on the other side of Tennessee Avenue*, and no property owner on the east side of Tennessee Avenue was assessed any money in connection with the work that Willowbrook actually did. The homes on the property located east of Tennessee Avenue and across from the property of the Olechs, the Zimmers, and

Mr. Brinkman are all the way over on Clarendon Hills Road, and those homes already had municipal water. Again, the amended complaint is not to the contrary.

The portion of Tennessee Avenue adjacent to the Brinkman, Olech, and Zimmer property was not a dedicated public street, and no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue. (Par. 22) In August 1995 Modaff told Zimmer that Willowbrook would not proceed with the requested water main extension unless all of the property owners involved granted Willowbrook a 33-foot easement along Tennessee Avenue, and Pretzer told Zimmer that a 33-foot easement would be required. (Pars. 22-23) On September 21, 1995, Modaff sent to the Olechs, the Zimmers, and Mr. Brinkman a Plat of Easement whereby they and the property owners on the other side of Tennessee Avenue would each dedicate a 33-foot strip of *their property* along Tennessee Avenue for public roadway purposes, which would result in a 66-foot wide dedicated public street. (Par. 25) These demands were not consistent with Willowbrook's policy regarding all other property in the village as was ultimately admitted on November 10, 1995, by the village attorney who stated that a 15-foot permanent easement would be sufficient and "consistent with Village policy regarding *all other property in the Village.*" (Emphasis added.) (Par. 26) The Defendants chose to treat the Olechs, the Zimmers, and Mr. Brinkman differently from all other property owners in Willowbrook as a result of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of the Olechs and the other plaintiffs in the state court lawsuit by the

use of ditches and swales along Tennessee Avenue. (Par. 27) The decision by the Defendants to treat the Olechs and the other plaintiffs in the state court lawsuit in a manner not consistent with all other property owners in Willowbrook was irrational and wholly arbitrary. (Par. 28)

Because the 33-foot easements and the 66-foot dedicated street demanded by Willowbrook as a condition of extending its water main was not consistent with what the Defendants required in relation to all other property in the village, the Olechs and the other property owners involved refused to grant the 33-foot easements and 66-foot street dedication. (Par. 30) Finally, on November 10, 1995, Willowbrook withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Willowbrook were granted a 15-foot easement for the water main and the related water service lines used to connect to the homes. (Par. 31) Because the 15-foot easement requested by Willowbrook in its attorney's letter of November 10, 1995, was consistent with what was required by Willowbrook in relation to all other property in Willowbrook, the Olechs and the other property owners involved agreed to grant the 15-foot easement. (Par. 32)

The initial refusal of the Defendants to proceed with the requested water main extension unless Willowbrook were granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather. (Par. 33) In November 1995 the overground hose used by the Olechs to connect to the Zimmers well froze, and the Olechs were without

running water from November of 1995 until the project was completed on March 19, 1996. (Par. 34) As a proximate result of the three-month delay caused by Willowbrook's illegal and vindictive demands, Grace Olech, who was 72 years old, and Thaddeus Olech, who was 76 years old, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental distress. (Par. 35)

#### ARGUMENT

1. *The amended complaint adequately sets forth a violation of the equal protection clause.*

In *Esmail v. Macrane* (7th Cir. 1995), 53 F.3d 176, the plaintiff, Basim Esmail, a liquor dealer, alleged that Naperville officials had developed a deep-seated animosity toward him as a result of his success in getting Naperville's revocation of his retail liquor license reduced by the state liquor control commission to a suspension, as a result of Esmail's advertising campaign accusing Naperville officials of ineffectual enforcement of the law prohibiting the sale of alcohol to minors, and as a result of Esmail's withdrawal of financial and political support for the mayor. (53 F.3d 176, 178.) Esmail alleged that in 1992 Naperville denied two of his license applications based on trivial or trumped-up charges while Naperville routinely granted licenses to persons who had engaged in similar conduct. (53 F.3d 176, 178.) Esmail alleged that the denials of his license applications were for the purpose of exacting retaliation and vengeance. (53 F.3d 176, 178.) Esmail alleged that he was required to spend substantial attorney's fees to get his license applications finally

granted through the intervention of the state courts. (53 F.3d 176, 177.) The Seventh Circuit found that the complaint adequately pleaded a violation of the equal protection clause. In language pertinent to this case, the Court stated:

"The distinctive [sic] feature here, which the district judge did not discuss, is that the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor.

Our decision in *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), holds that such conduct, so motivated, violates the equal protection clause; and the holding, although it has rarely brought ultimate victory to a plaintiff, does not stand alone. *Vukadinovich v. Board of School Trustees*, 978 F.2d 403, 414 and n. 9 (7th Cir. 1992); *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1547 (7th Cir. 1989); *Yerardi's Moody Street Restaurant v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981). . . . If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court."

53 F.3d 176, 179.

The Defendants' first argument is that in a claim under the equal protection clause pursuant to the principle discussed in *Esmail*, the plaintiff must plead "an orchestrated campaign of official harassment" directed at the individual "out of sheer malice." (Defendants' Memorandum, p. 7.) The Defendants argue that in this case the

amended complaint is insufficient because it does not set forth those elements.

The Defendants' argument is not well taken because *Esmail* does not require a plaintiff to plead an orchestrated campaign of official harassment or malice. What is required is that the plaintiff plead "unequal treatment" resulting from "animosity," vindictiveness, or bad faith on the part of the government officials involved. (53 F.3d 176, 179.) Significantly, the Court in *Esmail* cited *Ziegler v. Jackson* (5th Cir. 1981), 638 F.2d 776, 779, as a case applying its holding, and in *Ziegler* there was no allegation of an orchestrated campaign of official harassment. The allegation in *Ziegler* was simply that the plaintiff's rights under the equal protection clause were violated when a state agency refused to let him become a policeman because of certain prior convictions he had where the agency "had waived the character requirement for other individuals convicted of similar or more serious crimes." (638 F.2d 778-779.) Moreover, the Court in *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen* (1st Cir. 1989), 878 F.2d 16, 21, another case cited by the Court in *Esmail* as a case applying its holding, stated the principle as follows:

"[L]iability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." (Emphasis added.)

(878 F.2d 16, 21.)

The Court in *Yerardi's* did not require a showing of "an orchestrated campaign of official harassment" or "sheer malice." Unequal treatment undertaken in bad faith is enough. Finally, the case of *Ciechon v. City of Chicago* (7th Cir. 1982), 686 F.2d 511, cited by the Court in *Esmail* as the basis for its holding, did not involve an orchestrated campaign of official harassment or "sheer malice." It involved action by the city in terminating the employment of a paramedic based on an incident which received substantial press coverage where another paramedic who was equally responsible in the incident was not punished. What *Esmail* requires is that the plaintiff show unequal treatment resulting from vindictiveness, animosity, or other improper purpose of the government officials involved.

Obviously, Mrs. Olech has pleaded those required elements. Olech has pleaded that, as a condition of Willowbrook extending its water main to service the Olechs, the Zimmers, and Mr. Brinkman, Willowbrook demanded that they grant Willowbrook a 33-foot easement, and that Willowbrook be granted a 66-foot street dedication. As Willowbrook's attorney ultimately admitted, this was not consistent with what Willowbrook required in relation to "all other property" in Willowbrook, i.e., a simple 15-foot easement. Olech has also alleged that the Defendants chose to treat her differently for an improper purpose, i.e., as a result of the ill will generated by the state court lawsuit against Willowbrook and in an attempt to control stormwater drainage in the vicinity to the detriment of the plaintiffs in the state court lawsuit by the use of ditches and swales along Tennessee Avenue. Mrs. Olech's complaint is sufficient.

2. *Mrs. Olech has not "pled herself out of an action" by alleging that Willowbrook demanded that property owners on the other side of Tennessee Avenue grant a 33-foot easement.*

The Defendants second argument is that the Plaintiff "pled herself out of an action" by alleging that other property owners were asked to grant a 33-foot easement. Willowbrook argues that the fact that it demanded a 33-foot easement from the owners of property on the east side of Tennessee Avenue shows that it was not acting out of ill will toward the plaintiffs in the state court action, the Olechs, the Zimmers, and Mr. Brinkman.

The Defendants argument is based on either a careless or a contrived reading of the amended complaint and a misstatement of the facts. There are no homes on the east side of Tennessee Avenue across from the Olechs, the Zimmers, and Mr. Brinkman, nor does the amended complaint allege that there are. The homes to the east of the Olechs, the Zimmers, and Mr. Brinkman are all the way over on Clarendon Hills Road, and in the spring of 1995, they already had municipal water. The amended complaint is not to the contrary. What the amended complaint alleges is that Willowbrook demanded the 33-foot easements and 66-foot street dedication as a condition of extending its water main at the request of the Olechs, the Zimmers, and Howard Brinkman, the plaintiffs in the state court lawsuit, that *their* homes be hooked up to the municipal water supply. (Par. 19) In effect, Willowbrook told the Olechs, the Zimmers, and Mr. Brinkman that they would not get municipal water unless and until they granted the 33-foot easements and obtained such easements from the property owners across the street who already had municipal water. Willowbrook's illegal

demands were directed at the plaintiffs in the state court lawsuit. Mrs. Olech has not "pled herself out of an action."

The Defendants' argument in this regard is similar to the argument that, when a black person and his white friend are denied admission to a public accommodation because of the black person's race, the black person cannot recover because his white friend was also excluded. That argument does not fly (*Valle v. Stengel* (3d Cir. 1949), 176 F.2d 697), nor does the Defendants' argument here have any merit. The amended complaint alleges that the Defendants' illegal demands were the result of ill will against the plaintiffs in the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of the plaintiffs in the state court lawsuit by the use of ditches and swales along Tennessee Avenue (par. 27), and that allegation must be accepted as true. The Defendants motion to dismiss is not well taken, and it should be denied.

Respectfully submitted,

/s/ John R. Wimmer  
John R. Wimmer

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THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRACE OLECH,	)	
Plaintiff,	)	GEN. NO. 97 C 4935
vs.	)	Judge
VILLAGE OF	)	George M. Marovich
WILLOWBROOK, an	)	
Illinois municipal	)	
corporation, GARY	)	Magistrate Judge
PRETZER, individually	)	Keys
and as President of	)	
Defendant, VILLAGE OF	)	
WILLOWBROOK, and	)	
PHILIP J. MODAFF,	)	
individually and as	)	
Director of Public Services	)	
for Defendant, VILLAGE	)	
OF WILLOWBROOK,	)	
Defendants.	)	

REPLY

(Received Jan. 09, 1998)

NOW COMES the Defendants, the VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant, VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services for Defendant, VILLAGE OF WILLOWBROOK, by and through their attorneys, NORTON, MANCINI, ARGENTATI, WEILER & DeANO, and for their Reply to Plaintiff's Response to Defendants' Motion to Dismiss state as follows.

**Plaintiff's Amended Complaint  
Fails to Sufficiently Allege Malicious Conduct**

The standard for governmental conduct established by *Esmail* requires that the government orchestrate a campaign of official harassment aimed at doing significant harm to a harmless plaintiff. This cause of action is rooted in governmental conduct that is malicious, unrelenting, motivated by "malignant animosity," and "wholly unrelated to a legitimate public objective." *Esmail v. Macrane*, (7th Cir. 1995) 53 F.3d 176, 179-80; *Sarantakis v. Village of Winthrop Harbor*, (N.D.Ill. 1997) 969 F.Supp. 1095,<sup>1</sup> (plaintiff must demonstrate malice on the part of the governmental entity.) The necessary ingredients of the cause of action can be gleaned from the following statements in *Esmail*:

In particular, Esmail is not complaining merely that equally or more guilty liquor licensees than he are treated more leniently. He is complaining about an orchestrated campaign of official harassment directed against him out of sheer malice. 53 F.3d 176 at 179.

\* \* \*

If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant

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<sup>1</sup> *Sarantakis* is more closely analogous to this case since it involves the denial of governmental services, whereas *Esmail* involved the refusal of a liquor license. Where the claim involves the denial of governmental services, according to *Sarantakis*, equal protection claims must be based on discrimination directed at groups, rather than individuals. 969 F.Supp. at 1105.

animosity toward him, the individual ought to have a remedy in federal court. 53 F.3d at 179.

\* \* \*

What it (the equal protection clause) does require, and what *Esmail* may or may not be able to prove, is that the action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective. 53 F.3d at 180.

The Plaintiff's Complaint does not allege the severity of conduct required by *Esmail*. The Village's lack of malice and intent to harass is evidenced by the fact that it abandoned its initial request within three months and agreed to a permanent easement of fifteen feet and a temporary easement of five feet. Thus, the initial thirty-three foot easement request could have been only the result of a legitimate attempt to improve Tennessee Avenue or a mistake, neither of which can amount to a denial of equal protection.

A claim for violation of equal protection will not lie where the governmental action was taken out of error, neglect or mistake. *Ciechon v. City of Chicago*, (7th Cir. 1982) 686 F.2d 511, 523; *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497. Although a plaintiff can be a member of a class of limited membership, the plaintiff must have been singled-out because of his membership in that class and not be just the random victim of governmental incompetence. *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), aff'd 510 U.S.266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). At worst, Plaintiff's allegations show that the Plaintiff was a random victim of governmental

error; the Village initially asked the Plaintiff for a thirty-three-foot easement, but later obtained advice from counsel that a total of twenty feet of easement would suffice. (Plaintiff's Complaint at par. 26).

In *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, (7th Cir. 1996) 101 F.3d 1179, the court reasoned that even though a class can consist of a single member, the equal protection clause will apply in such circumstances only where the government seeks to "single out a hapless individual, firm or other entity for unfavorable treatment." 101 F. 3d at 1082. Even in such cases, however, the court noted that the plaintiff must still demonstrate defendant's conduct to be irrational and arbitrary.

In *Esmail*, the municipality "got" the plaintiff by depriving him of a liquor license thereby destroying his business. In *Ziegler v. Jackson*, (5th Cir. 1981) 638 F.2d 776, cited by *Esmail*, the governmental entity deprived the plaintiff of employment because of his convictions for presenting a fire arm and criminal provocation, while it retained other public employees convicted of similar offenses. The plaintiff therein could point to persons and circumstances identical to his own wherein the treatment was different.

Rather than demonstrating that Defendants attempted to "get" the Plaintiff, or that Defendants' conduct was irrational or arbitrary, Plaintiff's Complaint reveals that Defendants initially, and for a short time, sought an easement of sufficient width to improve the roadway with pavement, sidewalks and public utilities. Plaintiff, apparently not desirous of such improvements,

objected to the thirty-three foot easement, but ultimately agreed to a fifteen-foot easement, and another five-foot temporary construction easement. Defendants' conduct in this regard was hardly an orchestrated campaign of harassment, or an effort to "get" the Plaintiff, but merely a legitimate effort to improve a road obviously used by the Plaintiff with great frequency.

#### Defendants' Conduct Was Not the Cause of Plaintiff's Injury

In *Esmail*, the court found it significant that the plaintiff did not contribute to the cause of his predicament through his own conduct. The court characterized the plaintiff as a "harmless individual" whose treatment was "the result solely of a vindictive campaign by the mayor." 53 F.3d at 179. In *Indiana State Teachers Association*, the court followed this reasoning, noting that the plaintiff must be "hapless." 101 F.3d at 1082. In the context of this case, the Plaintiff cannot be said to be "harmless" or "hapless" with respect to her lack of water. It is not apparent from the Complaint that Plaintiff exhausted all reasonable attempts to repair her well or devise a new method of water delivery from her neighbor. In this sense, the Complaint fails to allege that Plaintiff's injury resulted "solely" from a vindictive campaign by Village officials. Plaintiff's deprivation of running water was merely incidental to the entire process and can hardly be deemed the objective of the Village. Plaintiff's Complaint even states that the plan to connect the homeowners on Tennessee Avenue to the municipal water supply system was developed in the spring of 1995 and was to be implemented within two years, or by the spring of 1997.

(Plaintiff's Complaint at par. 18). Yet, Plaintiff admits that she received water when the project was completed on or about March 19, 1996, a full year ahead of schedule. (Plaintiff's Complaint at par. 34).

There is no suggestion in Plaintiff's Complaint that the project was intended to be or could have been completed by November of 1995 when Plaintiff's hose froze. Plaintiff cites no law, custom, practice or precedent to suggest that the project should, would or could have provided public water service to the Plaintiff by November of 1995, even if the thirty-three foot easement had never been sought. Thus, irrespective of any attempts by the Village to acquire sufficient land to properly improve the road, Plaintiff cannot claim that her loss of water was due to the conduct of the Village.

Moreover, Plaintiff is still obligated to show that her injury would not have occurred but for Defendants' conduct. As the court noted in *Button v. Harden*, (7th Cir. 1987) 814 F.2d 382, 383:

Section 1983 is a tort statute. To prevail under it, a plaintiff must show not only that his federal rights were violated but also that, had it not been for the violation, the injury of which he complains would not have occurred. Citing *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977); *DeShaney v. Winnebago County Department of Social Services*, (7th Cir. 1987) 812 F.2d 298, 302.

#### The Plaintiff Has Not Sufficiently Alleged Others Similarly Situated Were Treated Differently

The Plaintiff has also failed to sufficiently allege that another person similarly situated to herself was treated differently. *O'Connor v. Chicago Transit Authority*, (7th Cir. 1993) 985 F.2d 1362; *Gaylor v. Thompson*, (W.D. Wis. 1996) 939 F.Supp. 1363, 1375. In *O'Connor*, an employee of the Chicago Transit Authority with a record of insubordination brought an equal protection claim asserting that his termination resulted from his whistle-blowing activity. Summary judgment for the defendant was affirmed, with the court noting that the plaintiff failed to demonstrate that another grossly insubordinate worker was treated differently than he.

In *Gaylor v. Thompson*, (W.D. Wis. 1996) 939 F.Supp. 1363, the plaintiffs applied for a display permit and alleged that they were denied equal protection because the governor directly engaged himself in the process, as he had done in no other case, and denied plaintiffs' application because of their views on the separation of church and state. Plaintiffs' failure to demonstrate how they were similarly situated to previous applicants or that they were the only ones treated differently than previous applicants resulted in dismissal of their claim.

The unique and extensive facts pled in Plaintiff's Complaint do not demonstrate a denial of equal protection. Plaintiff's residence adjacent to a non-dedicated road is a unique fact that contradicts the claim that others who sought connection to the public water supply were similarly situated. The Complaint alleges that Plaintiff requested a connection to the public water supply "right

away" after her well broke down. (Plaintiff's Amended Complaint at par. 19). The Plaintiff does not allege that any other residents who lived adjacent to such non-dedicated roads received public water "right away" after making a request or that the Village did not initially attempt to fully dedicate the road so that it could be improved with pavement, sidewalks and public utilities as part of the water connection project. The Complaint does not allege that the law required that Plaintiff's home be connected to the public water supply "right away" or that every other resident that ever made a request for public water service received that water "right away" or within three months or six months or nine months.

The Plaintiff alleges that Defendants' request for a thirty-three-foot easement was made in August and again in September, but that by November 10, 1995, the Village agreed that a fifteen-foot easement along with a five-foot temporary construction easement would suffice for the installation of the water main. The portion of the Village Attorney's letter cited in paragraph 26 of Plaintiff's Complaint is vague and does not suggest that Plaintiff was treated any differently than similarly situated residents. The letter states that the requirement of a fifteen-foot easement and a five-foot temporary construction easement was consistent with Village policy regarding "all other property" (emphasis added); this does not mean that other residents who lived adjacent to non-dedicated roads over which the governmental body had no easement were granted a water connection without a request for a thirty-three foot easement. Rather, the language cited by the Plaintiff is more reasonably construed to

mean that with respect to property "other" than Plaintiff's, i.e., where the residents seeking water were living adjacent to a fully improved road, fifteen-foot permanent and five-foot construction easements were sought by the Village.

Though Plaintiff attempts to draw the inference that her alleged unequal treatment was due to her status as a claimant against the Village in another lawsuit, that conclusion does not logically follow from the allegations of the Complaint. The Complaint pleads a rational, rather than arbitrary, basis for Defendants' conduct; the desire to improve a street used by the Plaintiff in conjunction with the installation of a water main under that street. As noted in *Albright v. Oliver*, (7th Cir. 1992) 975 F.2d 343, the state's act of singling out an individual for differential treatment does not itself create the class. It is the Plaintiff's membership in the class that must be the motivating force behind the government's act of singling her out for differential treatment. Absent allegations that the Village conditioned the delivery of public water to the Plaintiff on the Plaintiff's dismissal of her other claim against the Village, the Plaintiff has not properly alleged that her differential treatment resulted from her membership in a class of persons who have sued the Village.

*Ciechon v. City of Chicago*, (7th Cir. 1982) 686 F.2d 511, is distinguishable because the plaintiff therein could identify a similarly situated person who was treated differently by the defendant. The plaintiff was a female paramedic who was discharged by her employer because of her alleged failure to render proper treatment during an ambulance transport of a patient. The plaintiff's co-worker, a male, was not disciplined, though he was

equally responsible for the treatment of the patient in question. Here, the Plaintiff has not identified a person similarly situated, i.e., someone who lost their water source from a private well and requested and received water from the municipal supply "right away."

In *Ziegler v. Jackson*, (5th Cir. 1981) 638 F.2d 776, cited by *Esmail*, the plaintiff, who was convicted of presenting a firearm and criminal provocation, was discharged from his position as a police officer pursuant to a statute which precluded the hiring as a police officer any person convicted of an offense involving the use of force or violence or moral turpitude. Because three other individuals convicted of assault and forgery were retained as police officers, the court concluded that the plaintiff had been deprived of equal protection.

In *Johnson v. City of Fort Wayne*, (7th Cir. 1996) 91 F.3d 922, 945, summary judgment was granted for the defendant on the equal protection claim because the plaintiff failed to allege or demonstrate, as he must, that any other police officer or firefighter in an upper-level policy-making position was given notice and a hearing before being demoted to the rank that individual held prior to being appointed to the policy-making position.

### Conclusion

Plaintiff is asking this Court to scrutinize a decision to initially seek a thirty-three-foot easement for the improvement of a non-dedicated road as part of a project for the installation of a water main. Plaintiff's Complaint supplies facts which demonstrate that this request was neither arbitrary nor irrational, and also fails to allege

that similar requests for thirty-three-foot easements were not made when other residents requested the installation of a water main along a non-dedicated road. Moreover, the Plaintiff's loss of water was the result of her well breaking down and a hose freezing, not the result of governmental conduct. The extension of the principles which govern the *Esmail* decision to the facts set forth in Plaintiff's Complaint herein would trivialize the equal protection clause. *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, (7th Cir. 1996) 101 F.3d 1179, 1181 (the concept of equal protection is trivialized when it is used to subject every decision made by a local government to constitutional review by federal courts.)

WHEREFORE, in light of the foregoing, Defendants pray that this Court enter its Order dismissing the Plaintiff's Amended Complaint with prejudice.

Respectfully submitted,

NORTON, MANCINI,  
ARGENTATI, WEILER  
& DeANO

By: /s/ James L. DeAno  
James L. DeAno

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRACE OLECH,	)	
Plaintiff,	)	No. 97 C 4935
v.	)	
VILLAGE OF	)	Judge
WILLOWBROOK, et al.,	)	George M. Marovich
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

Plaintiff Grace Olech ("Olech") filed this action, pursuant to 42 U.S.C. § 1983, against Defendants the Village of Willowbrook ("Willowbrook" or the "Village"), Gary Pretzer ("Pretzer"), individually and as President of Willowbrook, and Philip Modaff ("Modaff"), individually and as Director of Public Services for Willowbrook, alleging that Defendants violated her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants have filed a motion to dismiss Olech's Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the Defendants' motion to dismiss is granted.

**BACKGROUND**

Olech is the 72-year-old owner and resident of a single-family home on Tennessee Avenue in Willowbrook,

Illinois.<sup>1</sup> Olech's home is located between two other homes on Tennessee Avenue - owned by Rodney and Phillis Zimmer (the "Zimmers") on the south and Howard Brinkman ("Brinkman") on the north.

Up until the spring of 1995, Olech and her late-husband obtained their potable water from a private well located on their property. In the spring of 1995, however, the Olechs' well broke down and was allegedly beyond repair. Because the Willowbrook water main extended only to the northern boundary of Brinkman's property - the Olechs' neighbor to the north on Tennessee Avenue - in order to obtain water, the Olechs were forced to hook an overground rubber hose up to the well of the Zimmers - their neighbors to the south on Tennessee Avenue.

The Olechs apparently viewed this as a "temporary solution" to their water problem. As such, the Olechs, the Zimmers and Brinkman allegedly asked Willowbrook to hook their homes up "right away" to the Willowbrook municipal water system. Olech contends that she explained her water problems (the broken well) to Modaff, the Director of Public Services for Willowbrook, and notified him that the overground hose would not work in the winter when the temperature fell below freezing.

Olech contends that after alerting Willowbrook to her problem, the Village began work on extending the water main to hook up Olech's home and the homes of her two neighbors. Willowbrook conditioned its work on an

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<sup>1</sup> Since the time that the events at issue in this suit took place Olech's husband, Thaddeus Olech, has died of causes unrelated to this action.

agreement by Olech and her neighbors to each pay one-third of the estimated cost of the project. By July 12, 1995, Willowbrook had received the required payments of \$7,012.67 from Olech and her neighbors.

However, in August of 1995, Willowbrook informed Olech and her neighbors that in addition to their cash payments for the project, Willowbrook also required them to grant the Village a 33-foot easement along Tennessee Avenue. According to Olech, the Plat of Easement created by Willowbrook required property owners of both sides of Tennessee Avenue – the Olechs, Zimmers, and Brinkman live on the west side of Tennessee Avenue – to dedicate a 33-foot strip of property along Tennessee Avenue for public roadway purposes. Specifically, Willowbrook wanted to install a paved roadway with sidewalks and public utilities on Tennessee Avenue.

The Olechs and their neighbors refused to grant Willowbrook the 33-foot easement that it required. As a result of the property owners' refusal to grant the easement, no progress was made on the water project. Finally, on November 10, 1995, Willowbrook's attorney prepared a letter in which the Village withdrew its demand for a 33-foot easement and indicated to Olech and her neighbors that it would proceed with the water main extension if they would grant Willowbrook a 15-foot easement for the water main and the related water service line used to connect the homes. According to Olech's Complaint, the letter from Willowbrook's attorney stated, in part:

[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the

water main. This is consistent with Village policy regarding all other property in the Village.

(Compl. at ¶ 26.) Olech and her neighbors agreed to grant Willowbrook the 15-foot easement and the water project was completed approximately four months later on March 19, 1996.

Meanwhile, in November 1995, the overground hose used by the Olechs to connect to their neighbor's well froze. As a result, Olech and her husband were without running water from November 1995 through March 19, 1996.

Olech filed her Complaint with this Court alleging that Willowbrook violated her rights under the Equal Protection Clause by initially requiring that she and her neighbors grant the Village a 33-foot easement while only requiring a 15-foot easement from other Village residents.<sup>2</sup> Olech contends that the reason that she and her neighbors were singled out by Willowbrook was because they had each filed state-court lawsuits against the Village six years earlier in August of 1989.<sup>3</sup> Olech alleges that these lawsuits made Willowbrook and its officers and employees "look bad." Olech further alleges that these

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<sup>2</sup> Olech bases this allegation on the letter she received from Willowbrook's attorney reporting that a 15-foot easement was "consistent with Village policy regarding all other property in the Village."

<sup>3</sup> The Olechs, the Zimmers and Brinkman filed three state-court suits against Willowbrook for damage that resulted from the flooding of their property by storm water. The Olechs and Zimmers were successful in their suits against Willowbrook. Brinkman's claims were dismissed for want of prosecution.

lawsuits generated “substantial ill will” on the part of Willowbrook and its officers and employees. This “ill will,” according to Olech, is what ultimately motivated Willowbrook to require a larger easement (33 feet) from her and her neighbors than what is normally required (15 feet) from other property owners in the Village. Olech maintains that the three-month delay, which resulted from Willowbrook’s request for the larger easement, is what ultimately caused her and her husband to be without running water during the winter of 1995-1996. Thus, it is this three-month delay that Olech claims deprived her of her rights under the Equal Protection Clause.

## DISCUSSION

### I. Standards For a Motion to Dismiss

When considering a motion to dismiss, the Court examines the sufficiency of the complaint, not the merits of the lawsuit. *See Triad Assoc. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989). “[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence that supports the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A motion to dismiss will be granted only if the Court finds that the plaintiff can prove no set of facts that would entitle him to relief. *See Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 432 (7th Cir. 1993); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss, the Court draws all inferences and resolves all ambiguities in the plaintiff’s favor and assumes that all well-pleaded facts are true. *See Dimmig v. Wahl*, 983 F.2d 86, 86 (7th Cir. 1993).

### II. Violation of the Equal Protection Clause

The Seventh Circuit has explained that there are two common varieties of equal protection claims: (1) those in which the plaintiff claims that she is a member of a vulnerable group (principally racial) and has been singled out for unequal treatment on that basis; and (2) those involving challenges to laws or rules that supposedly draw irrational distinctions. *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). A third and more unusual claim involves “orchestrated campaigns of official harassment directed against [a plaintiff] out of sheer malice.” *Id.* at 179. Olech contends that her Complaint belongs to this highly unusual class of equal protection claims.

In *Esmail*, a Naperville liquor dealer (*Esmail*) alleged that he was denied the renewal of his liquor license as a result of an “orchestrated campaign” by the mayor. Specifically, *Esmail* alleged that the mayor, who is also Naperville’s liquor control commissioner, not only denied his repeated applications for a liquor license, but also instituted a “campaign of vengeance” against him which consisted of causing the Naperville police to harass him and his employees with “constant, intrusive surveillance, in causing the police to stop his car repeatedly and forc[ing] him to undergo field sobriety tests, and in causing false criminal charges to be lodged against him.” *Id.* at 178. The court summarized that *Esmail*’s “charge here is that a powerful public official picked on a person out of sheer vindictiveness.” *id.*

After reviewing *Esmail*’s 22-page Complaint, the Seventh Circuit declared that:

If the power of the government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court.

*Id.* at 179.

While this Court is sympathetic to alleged wrong suffered by Olech and her husband, the Court is not convinced that Olech's Complaint describes the "malignant animosity" or the "orchestrated campaign of official harassment" complained of in *Esmail*. Even accepting Olech's allegations that her state-court action generated "ill will" in Willowbrook against her and her neighbors, this Court is unable to conclude that the Village ever "harassed" or "picked on" Olech and her neighbors "out of sheer vindictiveness" as in *Esmail*. At most, Olech's Complaint alleges that the Village acted unreasonably and out of "ill will" in requiring her to give up an extra 18 feet of easement space that was not required of other property holders. This hardly qualifies as the same type of conduct alleged to have been suffered in *Esmail*. Moreover, based on the allegations contained in Olech's Complaint, it appears that the reason that the Village wanted 33 feet of easement rather than 15 feet of easement was so that it would be able to install a paved public roadway along Tennessee Avenue with sidewalks and public utilities – something it apparently could not do without the additional 18 feet of space. (Compl. at ¶ 25.) Nothing in Olech's Complaint – apart from conclusory assertions – indicates that Willowbrook was acting out of vindictiveness or in retaliation for Olech's prior lawsuit. See *Trask v. Rios*, 1995 WL 758410, at \*5 (N.D. Ill. Dec. 19, 1995)

("'Harass,' 'discriminate,' and 'retaliate' are words to which legal significance attaches. Alone, they are legal conclusions that do not place defendants on notice of the circumstances from which the accusations arise and therefore are inappropriate pleading devices."); *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995) ("A complaint [that] consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)."). Assuming that all of the allegations contained in Olech's Complaint are true, it appears to this Court that there may be "ill will" on the part of both Willowbrook and Olech. Nevertheless, this Court finds that the alleged treatment of Olech by Willowbrook and its officers – as well as the alleged motivation behind this treatment – is not sufficient to state an equal-protection claim under the standards as set forth in *Esmail*.

### CONCLUSION

For the foregoing reasons, this Court grants Defendants' motion to dismiss.

ENTER:

/s/ George M. Marovich  
GEORGE M. MAROVICH  
UNITED STATES  
DISTRICT COURT

DATE: April 13, 1998

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**Minute Order Form (Rev. 12/90)****UNITED STATES DISTRICT COURT,  
NORTHERN DISTRICT OF ILLINOIS**

Name of Assigned Judge or Magistrate Judge  
GEORGE M. MAROVICH

Sitting Judge if Other Than Assigned Judge

Case Number 97 C 4935

Date April 13, 1998

Case Title  
OLECH -v- VILLAGE OF WILLOWBROOK et al

**MOTION:** [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

**DOCKET ENTRY:**

(1) [ ] Filed motion of [use listing in "MOTION" box above].

(2) [ ] Brief in support of motion due \_\_\_\_\_

(3) [ ] Answer brief to motion due \_\_\_\_\_  
Reply to answer brief due \_\_\_\_\_

(4) [ ] [ ] Ruling  
on \_\_\_\_\_ set for \_\_\_\_\_  
at \_\_\_\_\_

[ ] Hearing

(5) [ ] Status hearing  
[ ] held [ ] continued to  
[ ] set for [ ] re-set for  
at \_\_\_\_\_

(6) [ ] Pretrial conf.  
[ ] held [ ] continued to  
[ ] set for [ ] re-set for  
at \_\_\_\_\_

(7) [ ] Trial [ ] Set for [ ] re-set for  
\_\_\_\_\_ at \_\_\_\_\_

(8) [ ] [ ] Bench Trial [ ] Jury Trial  
[ ] Hearing  
held and continued to \_\_\_\_\_ at \_\_\_\_\_

(9) [ ] This case is dismissed  
[ ] without [ ] with  
prejudice and without costs  
[ ] by agreement [ ] pursuant to  
[ ] FRCP 4(j) (failure to serve)  
[ ] General Rule 21 (want of prosecution)  
[ ] FRCP 41(a)(1)  
[ ] FRCP 41(a)(2)

(10) [XX] [Other docket entry] Pursuant to  
Memorandum Opinion and Order entered  
this day, defendants' motion to dismiss is  
granted.

(11) [X] [For further detail see  
[ ] order on the reverse of  
[X] order attached to the original minute  
order form.]

[ ] No notices required, advised in open court.

[ ] No notices required.

[X] Notices mailed by judge's staff.

[ ] Notified counsel by telephone.

[ ] Docketing to mail notices.

[ ] Mail AO 450 form.

[ ] Copy to judge/magistrate Judge.

courtroom  
deputy's  
Initials

Date/time received in central Clerk's Office

\_\_\_\_\_ number of notices

\_\_\_\_\_ date docketed

\_\_\_\_\_ docketing dpty. initials

13 April 98 date mailed notice

mailing dpty. initials

Document #  
\_\_\_\_\_

**United States District Court  
Northern District of Illinois  
Eastern Division**

OLECH

**JUDGMENT IN A CIVIL CASE**

v.

Case Number: 97 C 4935

VILLAGE OF WILLOWBROOK et al

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED this action is dismissed in its entirety.

Michael W. Dobbins,  
Clerk of Court

/s/ J. Smith  
J. Smith, Deputy Clerk

Date: 4/13/98

NO. 98-2235  
 IN THE  
 UNITED STATES COURT OF APPEALS  
 FOR THE SEVENTH CIRCUIT

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GRACE OLECH, Plaintiff-Appellant,	) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
-vs-	)
VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, Defendants-Appellees.	) No. 97 C 4935 ) Hon. George M. Marovich, Judge Presiding. ) ) ) ) ) ) ) )

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BRIEF OF PLAINTIFF-APPELLANT GRACE OLECH

(Received Jul. 29, 1998)

JOHN R. WIMMER  
 928 Warren Avenue  
 Downers Grove, Illinois 60515  
 (630) 810-0005  
 Attorney for Plaintiff-Appellant

PLAINTIFF-APPELLANT'S  
CERTIFICATE OF INTEREST

Appellate Court No: 98-2235

Short Caption: Olech v. Village of Willowbrook, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.

- (1) The full name of every party or amicus the attorney represents in the case:  
Grace Olech
- (2) If such party or amicus is a corporation:
  - i) Its parent corporation, if any; and  
N/A
  - ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:  
N/A
- (3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:  
The Law Offices of John R. Wimmer

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material

changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in from [sic] of the table of contents of the party's main brief.

Attorney's Signature: /s/ John R. Wimmer

Attorney's Printed Name: John R. Wimmer

Date: May 20, 1998

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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

The plaintiff-appellant, Grace Olech, filed this action in the United States District Court for the Northern District of Illinois, Eastern Division, against the defendants-appellees, Village of Willowbrook, an Illinois municipal corporation, Gary Pretzer, individually and as President of Willowbrook, and Philip J. Modaff, individually and as Director of Public Services of Willowbrook. The plaintiff's Amended Complaint (Appendix 2-11) consisted of one count brought against all of the defendants under 42 U.S.C. §1983 and alleged that the defendants had deprived Grace Olech of her rights under the Equal Protection Clause of the United States constitution. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343.

On April 13, 1998, the district court issued a Memorandum Opinion And Order (Appendix 24-33) which granted the defendants' motion to dismiss this action under Fed.R.Civ.P. 12(b)(6). Also on April 13, 1998, the district court issued a Judgment In A Civil Case on form AO 450 (Appendix 34) which provided that "this action is dismissed in its entirety." The judgment was entered by the clerk on April 15, 1998. (See page 5 of the clerk's docket sheet.) The plaintiff filed her Notice Of Appeal on

May 13, 1998, or within 30 days after the entry of the judgment. (Doc. 23) No motions were ever filed for alteration of the judgment, and no motions were ever filed which are claimed to have tolled the time within which to appeal. This appeal is from a final judgment that disposes of all claims with respect to all parties. This Court has appellate jurisdiction pursuant to 28 U.S.C §1291.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Whether the district court erred in dismissing Grace Olech's Amended Complaint because the Amended Complaint states a claim under 42 U.S.C. §1983 for violation of Grace Olech's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution under the principles of this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), and whether the plaintiff "pled herself out of an action"?

**STATEMENT OF THE CASE**

The plaintiff-appellant, Grace Olech, filed this action against the defendants-appellees, the Village of Willowbrook, an Illinois municipal corporation, Gary Pretzer, individually and as President of Willowbrook, and Philip J. Modaff, individually and as Director of Public Services of Willowbrook. The action was filed under 42 U.S.C. §1983 and sought damages based on the violation of Mrs. Olech's rights under the Equal Protection Clause of the United States constitution. The defendants filed a motion to dismiss the action under Fed.R.Civ.P. 12(b)(6), and the district court granted that motion and entered judgment for the defendants.

### STATEMENT OF FACTS

This action was commenced on July 11, 1997, when the plaintiff-appellant, Grace Olech ("Olech" or "Mrs. Olech") filed her Complaint (Doc. 1-1) in the United States District Court for the Northern District of Illinois, Eastern Division, against the defendants-appellees, the Village of Willowbrook, an Illinois municipal corporation ("Willowbrook"), Gary Pretzer, individually and as President of Willowbrook ("Pretzer"), and Philip J. Modaff, individually and as Director of Public Services of Willowbrook ("Modaff"). On October 8, 1997, Olech filed an Amended Complaint (Appendix 2-11), having received leave of court to do so. (Doc. 7)

In her Amended Complaint, Olech alleged that she was a citizen of the United States and a resident of Willowbrook. (Appendix 3) Olech brought the lawsuit under 42 U.S.C. §1983 to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Appendix 2)

According to the Amended Complaint, on August 8, 1989, Olech and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Willowbrook and other defendants in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 ("the state court lawsuit"), in which the plaintiffs sought money damages from Willowbrook and the other defendants as a result of the flooding of the plaintiffs' property by stormwater. (Appendix 3) Howard Brinkman's claims in the state

court were dismissed for want of prosecution on April 1, 1991. (Appendix 3-4) The Olechs' claim against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Olech, individually and as special administrator of the estate of Thaddeus Olech, and against Willowbrook in the amount of \$20,000.00, and judgment was entered on the verdict. (Appendix 4) The claim of Rodney C. Zimmer and Phyllis S. Zimmer against Willowbrook in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of the Zimmers and against Willowbrook in the amount of \$135,000.00, and judgment was entered on that verdict. (Appendix 4) Grace Olech is Phyllis Zimmer's mother. (Appendix 3)

According to the Amended Complaint, the state court lawsuit against Willowbrook, which was ultimately determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Willowbrook, and generated substantial ill will toward the plaintiffs on the part of Willowbrook and its officers and employees, including Modaff and Pretzer. (Appendix 4) The Amended Complaint alleged that said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Willowbrook and its officers and employees look bad, from the erroneous belief on the part of Willowbrook's officers and employees that the state court lawsuit was frivolous and meritless, and from the fact that, prior to the filing of the state court lawsuit, Grace and Thaddeus Olech and Howard Brinkman had refused to grant certain drainage easements for a storm water drainage project favored by Willowbrook. (Appendix 4-5)

From a long time prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on November 24, 1996, Grace Olech and Thaddeus Olech were the joint owners of and resided in a single family home at 6440 Tennessee Avenue in Willowbrook, Illinois, on the west side of Tennessee Avenue. Since the death of Thaddeus, Grace Olech has been the sole owner of this property ("the Olech property") and has continued to reside there. (Appendix 5) In the spring of 1995 the private well on the Olech property, which provided potable water for the Olech home, broke down and was beyond repair. The Olechs then implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney and Phyllis Zimmer, via an overground hose. (Appendix 5) At that time Willowbrook's water main on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of the Olechs on Tennessee Avenue. (Appendix 5)

By the spring of 1995 Willowbrook had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to Willowbrook's municipal water system, to hook up to the system. (Appendix 6)

On May 23, 1995, while the state court lawsuit was pending, Grace Olech and Thaddeus Olech, along with Howard Brinkman, and Rodney and Phyllis Zimmer, made a request to Willowbrook that their homes be hooked up right away to Willowbrook's municipal water supply system. At or about that time Modaff was

informed that the well on the Olech property had broken down, and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing. (Appendix 6) As required by law, Willowbrook undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each of the three parcels of property involved of one-third of the estimated cost of the project. (Appendix 6) On July 11, 1995, Grace and Thaddeus Olech paid to Willowbrook \$7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Willowbrook had received the required payments from Howard Brinkman and the Zimmers. (Appendix 6-7)

According to the Amended Complaint, the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the Zimmer property is not, and never has been a dedicated public street, and no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the Brinkman, Olech, or Zimmer properties. (Appendix 7)

In August of 1995 Modaff told Phyllis Zimmer that Willowbrook would not proceed with the project unless all of the property owners involved granted Willowbrook a 33-foot easement along Tennessee Avenue, and in that same month Pretzer told Phyllis Zimmer that the 33-foot easement would be required for the project. (Appendix 7) On September 21, 1995, Modaff sent to Grace and Thaddeus Olech and to the other property owners involved a Plat of Easement whereby they and the property owners

on the other side of Tennessee Avenue would each dedicate to Willowbrook a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant to Willowbrook a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street. (Appendix 7)

According to the Amended Complaint, the defendants' demands for 33-foot easements and a 66-foot dedicated street as a condition of the extension of the water main were not consistent with the policy of Willowbrook regarding other property in Willowbrook. The Village Attorney, Gerald M. Gorski, eventually admitted as much in a letter dated November 10, 1995, in which he stated as follows:

[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

(Appendix 8)

The Amended Complaint alleges that the defendants treated Grace and Thaddeus Olech, Howard Brinkman, and Rodney and Phyllis Zimmer differently from other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of the Olechs and the other plaintiffs in the state court lawsuit, by the use of ditches and swales along

Tennessee Avenue. (Appendix 8) The Amended Complaint alleges that the defendants' decision to treat the Olechs and the other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main was irrational and wholly arbitrary, and was made by the appropriate policy-making official or employee of Willowbrook. (Appendix 8)

According to the Amended Complaint, because the 33-foot easements and the 66-foot dedicated street demanded by the defendants were not consistent with what the defendants required in relation to other property in the Village of Willowbrook, Grace and Thaddeus Olech and the other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication. (Appendix 8-9) And from the time that Modaff first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project. (Appendix 9)

On November 10, 1995, Willowbrook relented and withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Willowbrook were granted a 15-foot easement for the water main and for related water service lines used to connect the homes. (Appendix 9) The easement demanded by Willowbrook in its attorney's letter of November 10, 1995, was consistent with what was required by Willowbrook in relation to other property in Willowbrook, and, therefore, Grace and Thaddeus Olech, and the other property owners involved agreed to grant that easement. (Appendix 9)

The Amended Complaint alleged that the initial refusal of the defendants to proceed with the project unless Willowbrook was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather. (Appendix 9) In November of 1995 the overground hose used by Grace and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Grace and Thaddeus Olech were without running water from November of 1995 until the project was completed on March 19, 1996. (Appendix 9-10) The Amended Complaint alleges that "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress." (Appendix 10) The Amended Complaint alleges that the initial refusal of the defendants to proceed with the project unless Willowbrook was granted the 33-foot easements and 66-foot street dedication "and the concomitant and resulting delay in the project" deprived Grace Olech of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the defendants in that regard were undertaken either with the intent to deprive Grace Olech and others of those rights, or in reckless disregard of those rights. (Appendix 10) Finally, the Amended

Complaint alleged that the actions and inactions of the defendants set forth therein were undertaken under color of state law. (Appendix 10) Grace Olech sought compensatory and punitive damages as well as an award of her reasonable attorney's fees under 42 U.S.C. §1988. (Appendix 10-11)

The defendants filed a Motion To Dismiss Plaintiff's Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) (Appendix 13-14), which incorporated by reference a Memorandum Of Law In Support Of Motion To Dismiss (Appendix 14-22) In the memorandum, the defendants presented two arguments in support of their request for dismissal under Rule 12(b)(6). First, the defendants argued that the Amended Complaint did not allege a violation of the Equal Protection Clause pursuant to this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), because the Amended Complaint "lacks sufficient allegations of malice on the part of the defendants." (Appendix 20-21) The defendants also argued that the plaintiff had "pled herself out of an action by alleging that other homeowners were asked to grant a 33-foot easement." (Appendix 21-22)

The plaintiff filed Plaintiff's Response To Defendants' Motion To Dismiss The Amended Complaint (Doc. 18), and the defendants filed a Reply (Doc. 19), and on April 13, 1998, the district court issued its ruling. The district court held that "the alleged treatment of Olech by Willowbrook and its officers – as well as the alleged motivation behind this treatment – is not sufficient to state an equal protection claim under the standards as set forth in *Esmail*." (Appendix 32-33) Pursuant to its ruling, the district court issued a Judgment In A Civil Case on Form AO 450 which

provided that "this action is dismissed in its entirety." (Appendix 34) That judgment was entered by the clerk on April 15, 1998. (See page 5 of the clerk's docket sheet.) Grace Olech filed a Notice Of Appeal on May 13, 1998. (Doc. 23)

#### SUMMARY OF ARGUMENT

The district court erred in dismissing Grace Olech's Amended Complaint because the Amended Complaint stated a claim under 42 U.S.C. §1983 for violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution. Grace Olech's Amended Complaint adequately set forth that she was treated differently by Willowbrook and its President and Director of Public Services from other property owners in the village with regard to the extension of the village's water main to service her property. Mrs. Olech also adequately alleged that the unequal treatment was the result of vindictive ill will on the part of the defendants, which resulted from a state court lawsuit, and that the unequal treatment was undertaken for improper purposes. The allegations adequately set forth a violation of Mrs. Olech's rights under the Equal Protection Clause pursuant to this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995).

Moreover, Mrs. Olech has not "pled herself out of an action" as the defendants argued in the district court. The allegations of the Amended Complaint properly allege that the defendants' unequal treatment was of and directed to the plaintiffs in the state court lawsuit, and not to other people.

#### ARGUMENT

##### I. Standard of Review of a Dismissal under Fed.R.Civ.P. 12(b)(6).

Grace Olech's Amended Complaint was dismissed under Fed.R.Civ.P. 12(b)(6) for "failure to state a claim upon which relief can be granted." In evaluating a dismissal under this rule, it must be kept in mind that the Federal Rules of Civil Procedure establish "a system of notice pleading." (*Hrubec v. National Railroad Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992).) Accordingly, "[a] complaint need not narrate all relevant facts or recite the law; all it has to do is set out a claim for relief." (*Hrubec*, 981 F.2d 962, 963.) As stated by the United States Supreme Court in *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984):

"At this stage of the litigation [a motion to dismiss], we must accept petitioner's [the plaintiff's] allegations as true. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

Complaints are construed favorably to the plaintiff (*Hrubec*, 981 F.2d 962, 963), and the court accepts as true all reasonable inferences drawn from well-pleaded factual allegations (*Mount v. LaSalle Bank Lake View*, 926 F.Supp. 759, 763 (N.D.Ill. 1996)). The court must construe the pleadings liberally, and mere vagueness or lack of detail alone does not constitute sufficient grounds to dismiss a complaint. (*Mount*, 926 F.Supp. 759, 763.) Moreover, as stated by this Court in *Hrubec*:

"A plaintiff need not put all of the essential facts in the complaint. He may add them by affidavit or brief – even a brief on appeal."

(981 F.2d 962, 963-964.)

In fact, a plaintiff may provide the court with an unsubstantiated version of the events, provided it is consistent with the complaint, to show that the complaint is not subject to dismissal. (*Cushing v. City of Chicago*, 3 F.3d 1156, 1160 (7th Cir. 1993).) The latter rule "is necessary to give plaintiffs the benefit of the broad standard for surviving a Rule 12(b)(6) motion as articulated in *Hishon* [citation omitted], and *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)." *Cushing*, 3 F.3d 1156, 1160.

- II. The District Court erred in dismissing Grace Olech's Amended Complaint because the Amended Complaint states a claim under 42 U.S.C. §1983 for violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution under the principles of this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), and because the plaintiff has not "pled herself out of an action" by alleging that other homeowners were asked to grant a 33-foot easement.

As stated by this Court in *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995), there are two common kinds of cases under 42 U.S.C. §1983 involving violation of the Equal Protection Clause. This Court stated:

"One involves charges of singling out members of a vulnerable group, racial or otherwise, for unequal treatment. See, e.g., *City of Cleburne v.*

*Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985). The other, which rarely succeeds nowadays, involves challenges to laws or policies alleged to make irrational distinctions, *Lindsey v. Normet*, 405 U.S. 56, 74-79, 92 S.Ct. 862, 874-77, 31 L.Ed.2d 36 (1972), for example in tax rates."

In *Esmail* this Court recognized the validity of a third kind of equal protection case.

In *Esmail* the plaintiff, Basim Esmail, a liquor dealer, alleged that officials of the City of Naperville had developed a deep-seated animosity toward him as a result of his success in getting Naperville's revocation of his retail liquor license reduced by the state liquor control commission to a suspension, as a result of Esmail's advertising campaign accusing Naperville officials of ineffectual enforcement of the law prohibiting the sale of alcohol to minors, and as a result of Esmail's withdrawal of financial and political support for the mayor. (53 F.3d 176, 178.) Esmail alleged that in 1992 Naperville denied two of his liquor license applications based on trivial or trumped-up charges while Naperville routinely granted liquor licenses to persons who engaged in similar conduct. (53 F.3d 176, 178.) Esmail alleged that the denials of his liquor license applications were for the purpose of exacting retaliation and vengeance. (53 F.3d 176, 178.) Esmail alleged that he was required to spend substantial attorney's fees to get his liquor license applications finally granted through the intervention of the state courts. (53 F.3d 176, 177.) This Court held that Esmail's complaint adequately set forth a violation of the equal protection

clause. In language pertinent to Mrs. Olech's case, this Court stated:

"The distinctive feature here, which the district judge did not discuss, is that the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor.

Our decision in *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), holds that such conduct, so motivated, violates the equal protection clause; and the holding, although it has rarely brought ultimate victory to a plaintiff, does not stand alone. *Vukadinovich v. Board of School Trustees*, 978 F.2d 403, 414 and n. 9 (7th Cir. 1992); *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1547 (7th Cir. 1989); *Yerardi's Moody Street Restaurant v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981). . . . If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court."

53 F.3d 176, 179.

In this case, Grace Olech has alleged a case under 42 U.S.C. §1983 for violation of her rights under the Equal Protection Clause under the principles of this Court's decision in *Esmail*. Mrs. Olech has certainly alleged unequal treatment. She has alleged that the defendants treated her and other plaintiffs in the state court lawsuit "differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and

the 66-foot dedicated street as a condition of the extension of the [village's] water main" to service their property. (Appendix 8) Mrs. Olech alleged that the demands of the defendants for 33-foot easements and a 66-foot dedicated public street as a condition of the extension of the water main "were not consistent with the policy of Defendant VILLAGE OF WILLOWBROOK regarding other property in the Village of Willowbrook" (Appendix 7-8), and that the Village Attorney eventually admitted as much in a letter dated November 10, 1995, in which he stated as follows:

"[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

(Appendix 8)

Moreover, Grace Olech alleged that the unequal treatment was the result of a vindictive animosity on the part of village officials. Mrs. Olech alleged that the state court lawsuit, in which she and other plaintiffs won substantial damages from Willowbrook as a result of the flooding of their property by stormwater (Appendix 3-4), was the subject of substantial coverage in the local press. (Appendix 4) Mrs. Olech alleged that the state court lawsuit generated substantial ill will on the part of Willowbrook and its officers and employees, including Modaff and Pretzer. (Appendix 4) Mrs. Olech alleged that this ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Willowbrook and its officers and employees look bad; the erroneous belief on the part of the officers and employees

of Willowbrook that the state court lawsuit was frivolous and meritless; and the fact that, prior to the filing of the state court lawsuit, Grace and Thaddeus Olech and Howard Brinkman had refused to grant certain drainage easements for a stormwater drainage project favored by Willowbrook. (Appendix 5) Finally, Mrs. Olech alleged that the defendants treated her, Howard Brinkman, and the Zimmers differently from other property owners in Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main "because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue." (Appendix 8) (Obviously, with a dedicated street, Willowbrook would be able to influence stormwater drainage by way of the ditches at the side of the street.) Mrs. Olech has alleged unequal treatment as a result of vindictive animosity.

Moreover, the Amended Complaint alleged that the defendants' illegal demands were the cause of Mrs. Olech's injury. Mrs. Olech alleged that from the time Modaff first demanded the 33-foot easements in August of 1995 until Willowbrook withdrew its demands on November 10, 1995, no progress was made on the project (Appendix 9), and that the initial refusal of the defendants to proceed with the project unless Willowbrook was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, "a delay which proved critical as a result of the approaching winter weather." (Appendix 9) The

Amended Complaint alleges that in November of 1995, the overground hose used by the Olechs to connect to their neighbors' well froze, and, therefore, the Olechs were without running water from November of 1995 until the project was completed on March 19, 1996. (Appendix 9-10) Finally, the Amended Complaint alleged that the Olechs were without running water during the winter of 1995-1996 and suffered great inconvenience, humiliation, and mental and physical distress "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication." The Amended Complaint should not have been dismissed.

The district court attempted to distinguish *Esmail* from this case by stating that *Esmail* involved "malignant animosity" as opposed to the "ill will" alleged in this case. It is respectfully suggested that "animosity" and "ill will" are synonymous, and while Mrs. Olech did not explicitly characterize the "ill will" in this case as "malignant", which means evil, the well-pleaded facts of the Amended Complaint show that the ill will was, in fact, evil and not beneficial. The motives of the defendants were to get back at the plaintiffs in the state court lawsuit, and to control stormwater drainage in the vicinity to their detriment.

The district court also attempted to distinguish *Esmail* on the basis that it involved an "orchestrated campaign of official harassment" and this case did not. The word "campaign" connotes an extended series of events. Although *Esmail* involved such a campaign, this

Court did not hold that a plaintiff could not allege an equal protection violation unless he could show an "orchestrated campaign of official harassment." What this Court required was that the plaintiff plead "unequal treatment" resulting from "animosity", vindictiveness, or bad faith on the part of the government officials involved. (53 F.3d 176, 179.) Significantly, in *Esmail* this Court cited *Ziegler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981), as a case applying its holding, and in *Ziegler* there was no allegation of an orchestrated campaign of official harassment. The allegation in *Ziegler* was simply that the plaintiff's rights under the equal protection clause were violated when a state agency refused to let him become a policeman because of certain prior convictions he had where the agency "had waived the character requirement for other individuals convicted of similar or more serious crimes." (638 F.2d 778-779.) Moreover, the court in *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989), another case cited by this Court in *Esmail* as a case applying its holding, stated the principle as follows:

"[L]iability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." (Emphasis added.)

(878 F.2d 16, 21.)

The Court in *Yerardi's* did not require a showing of "an orchestrated campaign of official harassment." Unequal treatment undertaken maliciously or in bad faith to injure a person is enough. Finally, the case of *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), cited by this Court in *Esmail* as a basis for its holding, did not involve an orchestrated campaign of official harassment or "sheer vindictiveness". It involved action by the city in terminating the employment of a paramedic based on an incident which received substantial press coverage where another paramedic who was equally responsible in the incident was not punished. What *Esmail* requires is that the plaintiff show unequal treatment resulting from vindictiveness, animosity, or other improper purpose of the government officials involved, and Mrs. Olech has alleged that in this case.

The district court also stated that Mrs. Olech's allegations that Willowbrook was acting out of vindictiveness were legal conclusions unsupported by factual assertions. The district court's statements in this regard are difficult to understand. Mrs. Olech alleged the facts involved in the state court lawsuit. (Appendix 3-4) She described the coverage of the state court lawsuit in the local press and alleged in detail in paragraph 12 of the Amended Complaint the facts giving rise to the ill will on the part of the defendants toward the plaintiffs in that state court lawsuit. (Appendix 4-5) And Mrs. Olech alleged that the defendants treated her differently than [sic] other property owners in Willowbrook "because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech,

and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue," which Willowbrook would have controlled if the street had been dedicated. (Appendix 8) The factual detail here is certainly as extensive as that in *Esmail*. And even if it were not, lack of detail alone does not constitute sufficient grounds to dismiss a complaint (*Mount v. LaSalle Bank Lake View*, 926 F.Supp. 759, 763 (N.D.Ill. 1996)) under the federal system of notice pleading unless one can say that there is no set of facts consistent with the allegations of the complaint which would entitle the plaintiff to relief. The district court erred by ruling that Mrs. Olech's Amended Complaint was subject to dismissal because her allegations of vindictiveness were not sufficiently detailed. A plaintiff's complaint "need not narrate all relevant facts . . . ; all it has to do is set out a claim for relief." *Hrubec v. National Railroad Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992).

The defendants argued in their Memorandum Of Law In Support Of Motion To Dismiss that Mrs. Olech had "pled herself out of an action" by alleging that Willowbrook demanded that property owners on the other side of Tennessee Avenue grant a 33-foot easement. The defendants argued that the fact that they demanded a 33-foot easement from the owners of property across the street from Mr. Brinkman, the Olechs, and the Zimmers showed that the defendants were not acting out of ill will toward the plaintiffs in the state court lawsuit, Howard Brinkman, the Olechs, and the Zimmers.

The defendants' argument in this regard is without merit and is based on either a careless or a contrived reading of the Amended Complaint and a misstatement

of the facts. There are no homes on the east side of Tennessee Avenue across from Mr. Brinkman, the Olechs, and the Zimmers, nor does the Amended Complaint allege that there are. The homes to the east of the Olechs, the Zimmers, and Mr. Brinkman are not on Tennessee Avenue but are on all the way over on the next street to the east, Clarendon Hills Road, and in the spring of 1995, those homes already had municipal water. (Doc. 18, p. 11) The Amended Complaint is not to the contrary. What the Amended Complaint alleged was that the defendants demanded the 33-foot easements and 66-foot street dedication as a condition of extending the water main at the request of the Olechs, the Zimmers, and Howard Brinkman, the plaintiffs in the state court lawsuit that *their* homes be hooked up to the municipal water supply. (Appendix 6-7) In effect, the defendants told the Olechs, the Zimmers, and Howard Brinkman that they would not get municipal water unless and until they granted the 33-foot easements and obtained such easements from the property owners across the street who already had municipal water. The defendants' illegal demands were directed at the plaintiffs in the state court lawsuit and not at anyone else.

The Defendants' argument in this regard is similar to the argument that, when a black person and his white friend are denied admission to a public accommodation because of the black person's race, the black person cannot recover because his white friend was also excluded. That argument does not fly (*Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949)), nor does the defendants' argument here have any merit. The amended complaint alleges that the defendants illegal demands were the result of ill will

against the plaintiffs in the state court lawsuit and constituted an attempt to control stormwater drainage in the vicinity to the detriment of the plaintiffs in the state court lawsuit by the use of ditches and swales along Tennessee Avenue, and that allegation must be accepted as true. Mrs. Olech has not "pled herself out of an action."

Mrs. Olech's Amended Complaint adequately set forth a cause of action under 42 U.S.C. §1983 for violation of her rights under the Equal Protection Clause, and the district court erred in dismissing the action.

#### CONCLUSION

For the reasons stated herein, the plaintiff-appellant, Grace Olech, respectfully requests this Court to reverse the judgment entered in favor of the defendants in this action, and to remand this cause for further proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ John R. Wimmer  
John R. Wimmer

JOHN R. WIMMER  
Attorney at Law  
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(630) 810-0005

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#### CERTIFICATE OF COMPLETENESS OF APPENDIX

John R. Wimmer, counsel for the plaintiff-appellant, Grace Olech, hereby certifies that all of the materials required by parts (a) and (b) of Circuit Rule 30 are included in this Appendix.

/s/ John R. Wimmer  
John R. Wimmer

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRACE OLECH,	)
Plaintiff,	)
-vs-	) No. 97 C 4935
VILLAGE OF	) Judge Marovich
WILLOWBROOK, an	) Magistrate Judge Keys
Illinois municipal	) Plaintiff Demands
corporation, GARY	) Trial by Jury
PRETZER, individually	)
and as President of	)
Defendant VILLAGE OF	)
WILLOWBROOK, and	)
PHILIP J. MODAFF,	)
individually and as	)
Director of Public	)
Services of Defendant	)
VILLAGE OF	)
WILLOWBROOK,	)
Defendants.	)

AMENDED COMPLAINT

(42 U.S.C. § 1983)

(Filed Oct. 08, 1997)

NOW COMES Plaintiff GRACE OLECH, by and through her attorney, JOHN R. WIMMER, and complaining of the Defendants, VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and

as Director of Public Services of Defendant VILLAGE OF WILLOWBROOK, alleges and states as follows:

1. That Plaintiff GRACE OLECH has brought this action to redress the violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution.
2. That jurisdiction over this action has been conferred upon this Court under 28 U.S.C. § 1331 and § 1334, and 42 U.S.C. § 1983.
3. That Plaintiff GRACE OLECH is, and at all times hereinmentioned was, a citizen of the United States and a resident of Willowbrook, DuPage County, Illinois, and Plaintiff GRACE OLECH is the mother of Phyllis S. Zimmer who is mentioned hereinafter.
4. That Defendant VILLAGE OF WILLOWBROOK is, and at all times hereinmentioned was, a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois.
5. That Defendant GARY PRETZER is an individual who is President of Defendant VILLAGE OF WILLOWBROOK and was President of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.
6. That Defendant PHILIP J. MODAFF is an individual who was Director of Public Services of Defendant VILLAGE OF WILLOWBROOK during the time when Plaintiff GRACE OLECH was attempting to have her

home hooked up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

7. That on August 8, 1989, Plaintiff GRACE OLECH and her since deceased husband, Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, and others filed a lawsuit against Defendant VILLAGE OF WILLOWBROOK and others in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 89 L 1517 (hereinafter "the state court lawsuit"), in which the plaintiffs sought money damages from Defendant VILLAGE OF WILLOWBROOK and others as a result of the flooding of the plaintiffs' property, including what is hereinafter referred to as the Olech property, by stormwater.

8. That Howard Brinkman's claims in the state court case were dismissed for want of prosecution on April 1, 1991.

9. That the claim of Plaintiff GRACE OLECH and Thaddeus Olech against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Plaintiff GRACE OLECH, individually and as special administrator of the estate of Thaddeus Olech, and against Defendant VILLAGE OF WILLOWBROOK in the amount of \$20,000.00, and judgment was entered on that verdict.

10. That the claim of Rodney C. Zimmer and Phyllis S. Zimmer against Defendant VILLAGE OF WILLOWBROOK in the state court lawsuit was tried to a jury which, on February 11, 1997, returned a verdict in favor of Rodney C. Zimmer and Phyllis S. Zimmer and against

Defendant VILLAGE OF WILLOWBROOK in the amount of \$135,000.00, and judgment was entered on that verdict.

11. That the state court lawsuit against Defendant VILLAGE OF WILLOWBROOK, which was ultimately determined to be meritorious, was the subject of substantial coverage in the local press, was bitterly contested by Defendant VILLAGE OF WILLOWBROOK, and generated substantial ill will on the part of Defendant VILLAGE OF WILLOWBROOK and its officers and employees, including PHILIP J. MODAFF and, on information and belief, Defendant GARY PRETZER toward the plaintiffs in the state court lawsuit.

12. That, on information and belief, said ill will resulted from, among other things, the coverage of the state court lawsuit in the local press which made Defendant VILLAGE OF WILLOWBROOK and its officers and employees look bad; the erroneous belief on the part of officers and employees of Defendant VILLAGE OF WILLOWBROOK that the state court lawsuit was frivolous and meritless; and the fact that, prior to the filing of the state court lawsuit, Plaintiff GRACE OLECH and Thaddeus Olech, and Howard Brinkman had refused to grant certain drainage easements for a stormwater drainage project favored by Defendant VILLAGE OF WILLOWBROOK.

13. That, from a time long prior to the filing of the state court lawsuit and until the death of Thaddeus Olech on or about November 24, 1996, Plaintiff GRACE OLECH and Thaddeus Olech resided in a single-family home on, and were the joint owners of, certain property commonly known as 6440 Tennessee Avenue, Willowbrook, Illinois

60514 (hereinafter referred to as "the Olech property") and legally described as follows:

"The East half of the North half of the South half on the Southwest quarter of the Northeast quarter of the Northeast quarter of Section 22, Township 38 North, Range 11, East of the Third Principal Meridian in DuPage County, Illinois."

14. That, since the death of Thaddeus Olech, Plaintiff GRACE OLECH has been the sole owner of the Olech property and has continued to reside thereon.

15. That in the spring of 1995 the private well on the Olech property, which had theretofore provided potable water for the Olech home, broke down and was beyond repair.

16. That Plaintiff GRACE OLECH and Thaddeus Olech then and there implemented a temporary solution to the problem by hooking up to the well of their neighbors to the south on Tennessee Avenue, Rodney C. Zimmer and Phyllis S. Zimmer, via an overground hose.

17. That at that time the water main of Defendant VILLAGE OF WILLOWBROOK on Tennessee Avenue extended approximately as far south as the northern boundary of the property of Howard Brinkman, the neighbor to the north of Plaintiff GRACE OLECH and Thaddeus Olech.

18. That by the spring of 1995 Defendant VILLAGE OF WILLOWBROOK had developed a plan which was to be implemented within two years of the spring of 1995 and which was going to require all of the homeowners on Tennessee Avenue who were not hooked up to the municipal water supply system of Defendant VILLAGE OF

WILLOWBROOK to hook up to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK.

19. That on or about May 23, 1995, and while the state court lawsuit was pending, Plaintiff GRACE OLECH and Thaddeus Olech, along with Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer, made a request to Defendant VILLAGE OF WILLOWBROOK that their homes be hooked up right away to the municipal water supply system of Defendant VILLAGE OF WILLOWBROOK, and at or about that time Defendant PHILIP J. MODAFF was informed that the well on the Olech property had broken down and that the Olech home was obtaining potable water from the Zimmers' well via an overground hose, a temporary solution which would not work in the winter when the temperature fell below freezing.

20. That, as required by law, Defendant VILLAGE OF WILLOWBROOK undertook to extend the water main and hook up the homes as requested, conditioned on the payment by the owners of each parcel of property involved of one-third of the estimated cost of the project.

21. That on or about July 11, 1995, Plaintiff GRACE OLECH and Thaddeus Olech paid to Defendant VILLAGE OF WILLOWBROOK \$7,012.67, representing their share of the estimated cost of the project, and by July 12, 1995, Defendant VILLAGE OF WILLOWBROOK had received the required payments from Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer.

22. That the portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property of Rodney C. Zimmer and

Phyllis S. Zimmer is not, and never had been, a dedicated public street, and, on information and belief, no easements had been granted to any governmental body for the use of any portion of Tennessee Avenue adjacent to the property of Howard Brinkman, to the Olech property, and to the property owned by Rodney C. Zimmer and Phyllis S. Zimmer.

23. That in August of 1995 Defendant PHILIP J. MODAFF told Phyllis S. Zimmer that Defendant VILLAGE OF WILLOWBROOK would not proceed with the project unless all of the property owners involved granted Defendant VILLAGE OF WILLOWBROOK a 33-foot easement along Tennessee Avenue.

24. That in August of 1995 Defendant GARY PRETZER told Phyllis Zimmer that the 33-foot easement would be required for the project.

25. That on or about September 21, 1995, Defendant PHILIP J. MODAFF sent to Plaintiff GRACE OLECH and Thaddeus Olech and to other property owners involved a Plat of Easement whereby they and property owners on the other side of Tennessee Avenue would each dedicate a 33-foot strip of their property along Tennessee Avenue for public roadway purposes and grant a 33-foot easement for the construction and maintenance of a roadway, to include pavement, sidewalks, and public utilities, which would result in a 66-foot wide dedicated street.

26. That the demands of the Defendants for 33-foot easements and a 66-foot dedicated public street as a condition of the extension of the water main were not consistent with the policy of Defendant VILLAGE OF WILLOWBROOK regarding other property in the Village

of Willowbrook; as was ultimately admitted by the Village Attorney, Gerald M. Gorski, in a letter dated November 10, 1995, "[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village."

27. That the Defendants treated Plaintiff GRACE OLECH and Thaddeus Olech, Howard Brinkman, and Rodney C. Zimmer and Phyllis S. Zimmer differently from other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot dedicated street as a condition of the extension of the water main because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.

28. That the decision by the Defendants to treat Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit in a manner not consistent with other property owners in the Village of Willowbrook by demanding the 33-foot easements and the 66-foot street dedication as a condition for the extension of the water main was irrational and wholly arbitrary, and, on information and belief, was made by the appropriate policy-making official or employee of Defendant VILLAGE OF WILLOWBROOK.

29. That, because the 33-foot easements and the 66-foot dedicated street demanded by the Defendants were

not consistent with what the Defendants required in relation to other property in the Village of Willowbrook, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved declined to grant the 33-foot easements and the 66-foot street dedication.

30. That from the time that Defendant PHILIP J. MODAFF first demanded the 33-foot easements in August of 1995 until on or about November 10, 1995, no progress was made on the project.

31. That on or about November 10, 1995, Defendant VILLAGE OF WILLOWBROOK withdrew its demand for the 66-foot street dedication and indicated in a letter prepared by its attorney that it would proceed with the water main extension if Defendant VILLAGE OF WILLOWBROOK were granted a 15-foot easement for the water main and for the related water service lines used to connect to the homes.

32. That the easement demanded by Defendant VILLAGE OF WILLOWBROOK in its attorney's letter of November 10, 1995, was consistent with what was required by Defendant VILLAGE OF WILLOWBROOK in relation to other property in the Village of Willowbrook, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech, and other property owners involved, agreed to grant said easement.

33. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, a delay which proved critical as a result of the approaching winter weather.

34. That in November of 1995 the overground hose used by Plaintiff GRACE OLECH and Thaddeus Olech to connect to their neighbor's well froze, and, therefore, Plaintiff GRACE OLECH and Thaddeus Olech were without running water from November of 1995 until the project was completed on or about March 19, 1996.

35. That as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication, Plaintiff GRACE OLECH and Thaddeus Olech, who were 72 and 76 years old, respectively, were without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress.

36. That the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and 66-foot street dedication and the concomitant and resulting delay in the project deprived Plaintiff GRACE OLECH of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution, and the actions and inactions of the Defendants in that regard were undertaken either with the intent to deprive Plaintiff GRACE OLECH and others of said rights, or in reckless disregard of said rights.

37. That the actions and inactions of the Defendants set forth above were undertaken under color of state law.

WHEREFORE, Plaintiff GRACE OLECH prays that this Court:

- (a) Award Plaintiff GRACE OLECH compensatory damages in an amount to be determined by the trier of fact;
- (b) Award Plaintiff GRACE OLECH punitive damages in an amount to be determined by the trier of fact;
- (c) Award Plaintiff GRACE OLECH her reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988; and
- (d) Grant Plaintiff GRACE OLECH such other and further relief as is proper and just in the premises.

GRACE OLECH

By: /s/ John R. Wimmer  
Attorney for the Plaintiff

JOHN R. WIMMER  
Attorney at Law  
928 Warren Avenue  
Downers Grove, Illinois 60515  
(630) 810-0005  
Attorney No. 03125600

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IN THE  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRACE OLECH,	)	
	)	<i>Plaintiff,</i>
vs.	)	NO. 97 C 4935
VILLAGE OF WILLOWBROOK,	)	Judge Marovich
an Illinois Municipal	)	
Corporation, GARY PRETZER,	)	
Individually and as President	)	
of Defendant VILLAGE OF	)	
WILLOWBROOK, and PHILIP	)	
J. MODAFF, Individually and	)	
as Director of Public Services	)	
for Defendant VILLAGE OF	)	
WILLOWBROOK,	)	
	)	<i>Defendants.</i>

**MOTION TO DISMISS  
PLAINTIFF'S AMENDED COMPLAINT**

(Received Oct. 28, 1997)

NOW COME the Defendants, the Village of Willowbrook, Gary Pretzer and Philip J. Modaff, by their attorneys, Robert C. Yelton III and Jeffrey Edward Kehl of Dowd & Dowd, Ltd., and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, move this court to dismiss the Plaintiff's Complaint for failure to state a cause of action upon which relief may be granted. For this Motion, the Defendants would show this court as follows:

1. On October 8, 1997, the Plaintiff caused her one count Amended Complaint to be filed against the Village

of Willowbrook and two of its employees, Gary Pretzer and Philip J. Modaff (A copy of the Plaintiff's Amended Complaint is attached hereto and incorporated herein as Exhibit A).

2. The Plaintiff seeks relief under 42 U.S.C. § 1983 for what the Plaintiff alleges to be a violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Plaintiff's Amended Complaint, ¶ 1).

3. As more specifically submitted in the Defendants' Memorandum of Law in Support of Motion to Dismiss filed contemporaneously herewith, the Defendants contend that the Plaintiff has failed to state a cause of action upon which relief may be granted because she has not alleged discrimination based upon her exercise of constitutional rights.

WHEREFORE, the Defendants respectfully request this court to enter an order dismissing the Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dowd & Dowd, Ltd.

/s/ Jeffrey Edward Kehl  
Jeffrey Edward Kehl  
One of the Attorneys  
for the Defendants

Robert C. Yelton III  
Jeffrey Edward Kehl  
DOWD & DOWD, LTD.  
55 West Wacker Drive, Suite 1000  
Chicago, Illinois 60601  
(312) 704-4400  
Counsel for the Defendants

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IN THE  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRACE OLECH,	)	
	)	<i>Plaintiff,</i>
vs.	)	NO. 97 C 4935
VILLAGE OF WILLOWBROOK,	)	Judge Marovich
an Illinois Municipal	)	
Corporation, GARY PRETZER,	)	
Individually and as President	)	
of Defendant VILLAGE OF	)	
WILLOWBROOK, and PHILIP	)	
J. MODAFF, Individually and	)	
as Director of Public Services	)	
for Defendant VILLAGE OF	)	
WILLOWBROOK,	)	
	)	
	)	<i>Defendants.</i>

**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS**

(Received Oct. 28, 1997)

NOW COME the Defendants, the Village of Willowbrook, Gary Pretzer, and Philip J. Modaff, by their attorneys, Robert C. Yelton III and Jeffrey Edward Kehl of Dowd & Dowd, Ltd., and submit the following matters for the court's consideration in ruling on the Defendants' Motion to Dismiss the Plaintiff's Amended Complaint.

**Preface**

The Plaintiff's Amended Complaint seeks relief under 42 U.S.C. § 1983 for what the Plaintiff perceives to be a violation of her rights under the Equal Protection

Clause of the Fourteenth Amendment to the United States Constitution. The Defendants have filed a Motion to Dismiss because the Amended Complaint fails to state a cause of action upon which relief may be granted. As will be demonstrated below, the facts alleged by the Plaintiff do not support the conclusion that the Defendants violated her right to equal protection under the laws of this State. As such, no remedy is available to the Plaintiff under 42 U.S.C. § 1983.

#### Standard of Review

In considering a Motion to Dismiss, this court is obligated to view all factual allegations in the light most favorable to the Plaintiff. A motion to dismiss will not be granted unless it appears from the complaint that the Plaintiff can prove no set of facts to support her claims that would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 954 (7th Cir. 1989). To this end, all well-pleaded facts are taken as true. *City of Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976).

This does not mean, however, that extensive factual allegations or even a factual dispute will immunize a complaint from dismissal under Rule 12(b)(6). Rather, even with all facts being accepted by the court, the Plaintiff must still present a cause of action as a matter of law. *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 433 (7th Cir. 1978).

More importantly, this court is not "to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported

conclusions of law." *D'City National Bank v. Checker, Simon & Rosner*, 32 F.3d 277, 281 (7th Cir. 1994) (quoting *Dimming v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993)).

#### Factual Background

The Amended Complaint alleges that prior to the Spring of 1995, the Village of Willowbrook developed a plan under which all houses along Tennessee Avenue in Willowbrook were to be hooked up to the Village's water system. The plan was to be implemented within two years of the Spring of 1995. (Amended Complaint, ¶ 18). As part of this two-year plan, homeowners could be connected to the Village water system only if they paid one-third of the total cost for the connection. (Amended Complaint, ¶ 20). In addition, homeowners on both sides of Tennessee Avenue would be required to grant a 33 foot easement to the Village. (Amended Complaint, ¶ 25).

According to the Plaintiff, in the Spring of 1995, the private well servicing her residence at 6440 Tennessee Avenue in Willowbrook, Illinois broke down. (Amended Complaint, ¶ 17). In order to have water available in her house, the Plaintiff had a garden hose run from her neighbor's house to hers. (Amended Complaint, ¶ 16).

On May 23, 1995, the Plaintiff and her adjoining neighbors, the Zimmers and the Brinkmans, made a written request to the Village to have their residences connected to the Village's water system "right away." (Amended Complaint, ¶ 19). Nearly two months later, on July 11, 1995, the Plaintiff paid the Village her share of the cost for the proposed connection under the two-year

plan. (Amended Complaint, ¶ 21). The Plaintiff's adjoining neighbors, the Brinkmans and the Zimmers paid shortly thereafter. (Amended Complaint, ¶ 21). The Plaintiff makes no mention of when the homeowners on the other side of Tennessee Avenue paid their shares, if ever.

The Plaintiff claims that notice of the proposed 33 foot easement was not given to her neighbor until August 1995. (Amended Complaint, ¶¶ 23-24). Written notice was sent to the Plaintiff in September of that year. (Amended Complaint, ¶ 25). In any event, the Plaintiff alleges that the demand for a 33 foot easement was not acceptable to her. As such, she and some of the other property owners refused to grant the Village the requested easement. (Amended Complaint, ¶ 29).

Subsequently, on November 10, 1995, the Village sent a letter to the Plaintiff which apparently indicated that a street dedication was not necessary to complete the job but that a temporary construction easement and a permanent easement of fifteen feet would be required. According to the Amended Complaint, a letter from the Village Attorney indicated that a 15 foot easement would be consistent with Village policy regarding all other property in the Village. (Amended Complaint, ¶ 26).

The Plaintiff alleges that because the fifteen foot easement was consistent with requirements for other properties in the Village, she and other property owners agreed to grant the required easement. The Plaintiff does not allege that all affected property owners granted the easement, or if so, when. (Amended Complaint, ¶ 32).

In November, 1995 the hose running from to [sic] the Plaintiff's house broke, leaving her with no running

water until the two-year project was completed on March 19, 1996. (Amended Complaint, ¶ 34). The Plaintiff does not explain why a new hose was not implemented, why she never had her well fixed, or how the lack of running water in late 1995 differed from her predicament in the Spring of 1995.

In any event, the Plaintiff claims that "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless [the Village] was granted the 33-foot easement and the 66-foot street dedication, [the Plaintiff was] without running water during the winter of 1995-1996, and suffered great inconvenience, humiliation, and mental and physical distress." (Amended Complaint, ¶ 35).

For her action, the Plaintiff maintains that the initial refusal to proceed without a 33 foot easement and the three-month delay before a 15-foot easement was required deprived her of her rights under the Equal Protection Clause of the Fourteenth Amendment. (Amended Complaint, ¶ 36). Specifically, the Plaintiff claims that the refusal to proceed without a 33-foot easement was prompted by "ill will" on the part of the Defendants because the Plaintiff, the Zimmers, and Howard Brinkman had filed a lawsuit against the Village. (Amended Complaint, ¶¶ 11-12). However, as the Plaintiff concedes, the action brought by Mr. Brinkman had been dismissed in 1991, and the Plaintiff's own action, viewed as frivolous by the Village in 1995, did not result in a judgment in favor of the Plaintiff until 1997. (Amended Complaint, ¶¶ 7-10).

The Plaintiff does not explain how the alleged "ill will" harbored by the Village toward the Plaintiff, Zimmers, and Mr. Brinkman manifested itself other than by the requirement that the homeowners grant a 33-foot easement. The fact that the 33-foot easement was also required of property owners on the other side of Tennessee Avenue, (Amended Complaint, ¶ 25), who had not sued the Village and for whom there are no allegations of "ill will" is, as discussed below, most destructive to the Plaintiff's claim.

#### **Argument**

##### **The Plaintiff Fails to Allege a Cause of Action under § 1983 for any Violation of her Rights Under the Equal Protection Clause of the Fourteenth Amendment.**

The Plaintiff seeks to impose § 1983 liability on the Defendants under what has been colloquially known as "Category Three" discrimination. Within the general rubric of equal protection law, a plaintiff must show disparate treatment based on membership in a vulnerable group, racial or otherwise, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985), or based upon the application of laws or policies which make irrational distinctions. *Lindsey v. Normet*, 405 U.S. 56, 74-79, 92 S.Ct. 862, 874-77, 31 L.Ed.2d 36 (1972). "Category Three" discrimination, however, occurs where "a powerful public official picked on a person out of sheer vindictiveness," and where there is "an orchestrated campaign of official harassment" directed at the individual "out of sheer malice." *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995).

The Plaintiff, by including many allegations regarding the state court action she and others brought against the Village, and by alleging that that lawsuit created "ill will" on the part of the Defendants, seeks to hawk this otherwise federally insignificant series of events as a matter of great constitutional import. The Defendants submit that this case has no business being in federal court for two reasons. First, the allegations do not sufficiently plead malice on the part of the Defendants. Second, the allegations of the Amended Complaint establish that the Plaintiff was treated no differently than homeowners against whom the Village harbored no "ill will."

##### **1. The Amended Complaint Lacks Sufficient Allegations of Malice on the Part of the Defendants.**

As indicated above, "Category Three" discrimination requires facts [sic] which establish "an orchestrated campaign of official harassment" directed at the individual "out of sheer malice." *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). All the Plaintiff can muster here is allegations that the Defendants harbored "ill will" against the Plaintiff because of her prior lawsuit. No facts are set forth that show any "orchestrated campaign" or any ugly motive approaching "malice." Unless the Plaintiff can paint a more evil picture of the Defendants, her action should be dismissed for failure to state a cause of action upon which relief may be granted.

##### **2. The Plaintiff Has Pled Herself Out of an Action By Alleging that Other Homeowners Were Asked to Grant a 33-Foot Easement.**

The Plaintiff claims that her right to equal protection was violated by the Village because the Village wanted

her to grant a 33-foot easement only because she had filed a state court action against the Village. This argument is defeated by the Plaintiff's own allegations.

The Plaintiff has alleged that the Village wanted all homeowners along *both sides* of Tennessee Avenue to grant a 33-foot easement. (Amended Complaint, ¶ 25). The Plaintiff, the Zimmers, and Mr. Brinkman all lived on one side of Tennessee Avenue. (Amended Complaint, ¶ 17). No one from the other side of Tennessee Avenue is alleged to have filed a state court action which caused "ill will" on the part of the Defendants.

Distilled to its finest essence, the Plaintiff's Amended Complaint states that the Plaintiff and her neighbors were all required to grant a 33-foot easement, regardless of whether they had filed a lawsuit against the Village. All homeowners along Tennessee Avenue were treated identically. As such, the Plaintiff could not possibly have been the victim of "sheer malice" or "vindictiveness" on the part of the Defendants.

The Equal Protection Clause cannot be construed as a means by which the Plaintiff may bring her whining before this court. Despite having filed a state court action against the Village, she was treated identically with those individuals who had not. In fact, the Amended Complaint shows that the two-year project was completed (as far as the Plaintiff was concerned) within a year. While the Plaintiff may have remained inconvenienced by her broken well and lack of potable water for longer than she wanted, this does not amount to a constitutional injury. As Judge Posner noted, "[t]he concept of equal protection is trivialized when it is used to subject every decision

made by state or local government to constitutional review by federal courts." *Indiana State Teachers Assn. v. Board of School Comm'r's of the City of Indianapolis*, 1010 F.3d 1179, 1181 (7th Cir. 1996).

### **Conclusion**

For the foregoing reasons, the Defendants request this court to grant their Motion to Dismiss the Plaintiff's Amended Complaint.

Dowd & Dowd, Ltd.

/s/ Jeffrey Edward Kehl  
 Jeffrey Edward Kehl  
 One of the Attorneys  
 for the Defendants

Robert C. Yelton III  
 Jeffrey Edward Kehl  
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 Counsel for the Defendants

---

**Minute Order Form (Rev. 12/90)****UNITED STATES DISTRICT COURT,  
NORTHERN DISTRICT OF ILLINOIS**

Name of Assigned Judge or Magistrate Judge  
GEORGE M. MAROVICH

Sitting Judge if Other Than Assigned Judge

Case Number 97 C 4935

Date April 13, 1998

Case Title  
OLECH -v- VILLAGE OF WILLOWBROOK et al

**MOTION:** [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

**DOCKET ENTRY:**

(1) [ ] Filed motion of [use listing in "MOTION" box above].

(2) [ ] Brief in support of motion due \_\_\_\_\_

(3) [ ] Answer brief to motion due \_\_\_\_\_  
Reply to answer brief due \_\_\_\_\_

(4) [ ] [ ] Ruling  
on \_\_\_\_\_ set for \_\_\_\_\_  
at \_\_\_\_\_

[ ] Hearing

(5) [ ] Status hearing  
[ ] held [ ] continued to  
[ ] set for [ ] re-set for  
at \_\_\_\_\_

(6) [ ] Pretrial conf.  
[ ] held [ ] continued to

[ ] set for [ ] re-set for  
\_\_\_\_\_ at \_\_\_\_\_

(7) [ ] Trial [ ] Set for [ ] re-set for  
\_\_\_\_\_ at \_\_\_\_\_

(8) [ ] [ ] Bench Trial [ ] Jury Trial  
[ ] Hearing  
held and continued to \_\_\_\_\_ at \_\_\_\_\_

(9) [ ] This case is dismissed  
[ ] without [ ] with  
prejudice and without costs  
[ ] by agreement [ ] pursuant to  
[ ] FRCP 4(j) (failure to serve)  
[ ] General Rule 21 (want of prosecution)  
[ ] FRCP 41(a)(1)  
[ ] FRCP 41(a)(2)

(10) [XX] [Other docket entry] Pursuant to Memorandum Opinion and Order entered this day, defendants' motion to dismiss is granted.

(11) [X] [For further detail see  
[ ] order on the reverse of  
[X] order attached to the original minute order form.]

[ ] No notices required, advised in open court.

[ ] No notices required.

[X] Notices mailed by judge's staff.

[ ] Notified counsel by telephone.

[ ] Docketing to mail notices.

[ ] Mail AO 450 form.

Copy to judge/magistrate Judge.

courtroom  
deputy's  
Initials

Date/time received in central Clerk's Office

number of notices

APR 15 1998 date docketed

docketing dpty. initials

13 April 98 date mailed notice

mailing dpty. initials

Document #21

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRACE OLECH,	)	
Plaintiff,	)	
v.	)	No. 97 C 4935
VILLAGE OF WILLOWBROOK,	)	Judge George M.
et al.,	)	Marovich
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Grace Olech ("Olech") filed this action, pursuant to 42 U.S.C. § 1983, against Defendants the Village of Willowbrook ("Willowbrook" or the "Village"), Gary

Pretzer ("Pretzer"), individually and as President of Willowbrook, and Philip Modaff ("Modaff"), individually and as Director of Public Services for Willowbrook, alleging that Defendants violated her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants have filed a motion to dismiss Olech's Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the Defendants' motion to dismiss is granted.

BACKGROUND

Olech is the 72-year-old owner and resident of a single-family home on Tennessee Avenue in Willowbrook, Illinois.<sup>1</sup> Olech's home is located between two other homes on Tennessee Avenue – owned by Rodney and Phyllis Zimmer (the "Zimmers") on the south and Howard Brinkman ("Brinkman") on the north.

Up until the spring of 1995, Olech and her late-husband obtained their potable water from a private well located on their property. In the spring of 1995, however, the Olechs' well broke down and was allegedly beyond repair. Because the Willowbrook water main extended only to the northern boundary of Brinkman's property – the Olechs' neighbor to the north on Tennessee Avenue – in order to obtain water, the Olechs were forced to hook an overground rubber hose up to the well of the Zimmers – their neighbors to the south on Tennessee Avenue.

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<sup>1</sup> Since the time that the events at issue in this suit took place Olech's husband, Thaddeus Olech, has died of causes unrelated to this action.

The Olechs apparently viewed this as a "temporary solution" to their water problem. As such, the Olechs, the Zimmers and Brinkman allegedly asked Willowbrook to hook their homes up "right away" to the Willowbrook municipal water system. Olech contends that she explained her water problems (the broken well) to Modaff, the Director of Public Services for Willowbrook, and notified him that the overground hose would not work in the winter when the temperature fell below freezing.

Olech contends that after alerting Willowbrook to her problem, the Village began work on extending the water main to hook up Olech's home and the homes of her two neighbors. Willowbrook conditioned its work on an agreement by Olech and her neighbors to each pay one-third of the estimated cost of the project. By July 12, 1995, Willowbrook had received the required payments of \$7,012.67 from Olech and her neighbors.

However, in August of 1995, Willowbrook informed Olech and her neighbors that in addition to their cash payments for the project, Willowbrook also required them to grant the Village a 33-foot easement along Tennessee Avenue. According to Olech, the Plat of Easement created by Willowbrook required property owners of both sides of Tennessee Avenue – the Olechs, Zimmers, and Brinkman live on the west side of Tennessee Avenue – to dedicate a 33-foot strip of property along Tennessee Avenue for public roadway purposes. Specifically, Willowbrook wanted to install a paved roadway with sidewalks and public utilities on Tennessee Avenue.

The Olechs and their neighbors refused to grant Willowbrook the 33-foot easement that it required. As a

result of the property owners' refusal to grant the easement, no progress was made on the water project. Finally, on November 10, 1995, Willowbrook's attorney prepared a letter in which the Village withdrew its demand for a 33-foot easement and indicated to Olech and her neighbors that it would proceed with the water main extension if they would grant Willowbrook a 15-foot easement for the water main and the related water service line used to connect the homes. According to Olech's Complaint, the letter from Willowbrook's attorney stated, in part:

[A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village.

(Compl. at ¶ 26.) Olech and her neighbors agreed to grant Willowbrook the 15-foot easement and the water project was completed approximately four months later on March 19, 1996.

Meanwhile, in November 1995, the overground hose used by the Olechs to connect to their neighbor's well froze. As a result, Olech and her husband were without running water from November 1995 through March 19, 1996.

Olech filed her Complaint with this Court alleging that Willowbrook violated her rights under the Equal Protection Clause by initially requiring that she and her neighbors grant the Village a 33-foot easement while only

requiring a 15-foot easement from other Village residents.<sup>2</sup> Olech contends that the reason that she and her neighbors were singled out by Willowbrook was because they had each filed state-court lawsuits against the Village six years earlier in August of 1989.<sup>3</sup> Olech alleges that these lawsuits made Willowbrook and its officers and employees "look bad." Olech further alleges that these lawsuits generated "substantial ill will" on the part of Willowbrook and its officers and employees. This "ill will," according to Olech, is what ultimately motivated Willowbrook to require a larger easement (33 feet) from her and her neighbors than what is normally required (15 feet) from other property owners in the Village. Olech maintains that the three-month delay, which resulted from Willowbrook's request for the larger easement, is what ultimately caused her and her husband to be without running water during the winter of 1995-1996. Thus, it is this three-month delay that Olech claims deprived her of her rights under the Equal Protection Clause.

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<sup>2</sup> Olech bases this allegation on the letter she received from Willowbrook's attorney reporting that a 15-foot easement was "consistent with Village policy regarding all other property in the Village."

<sup>3</sup> The Olechs, the Zimmers and Brinkman filed three state-court suits against Willowbrook for damage that resulted from the flooding of their property by storm water. The Olechs and Zimmers were successful in their suits against Willowbrook. Brinkman's claims were dismissed for want of prosecution.

## DISCUSSION

### I. Standards For a Motion to Dismiss

When considering a motion to dismiss, the Court examines the sufficiency of the complaint, not the merits of the lawsuit. *See Triad Assoc. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989). "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence that supports the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A motion to dismiss will be granted only if the Court finds that the plaintiff can prove no set of facts that would entitle him to relief. *See Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 432 (7th Cir. 1993); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss, the Court draws all inferences and resolves all ambiguities in the plaintiff's favor and assumes that all well-pleaded facts are true. *See Dammig v. Wahl*, 983 F.2d 86, 86 (7th Cir. 1993).

### II. Violation of the Equal Protection Clause

The Seventh Circuit has explained that there are two common varieties of equal protection claims: (1) those in which the plaintiff claims that she is a member of a vulnerable group (principally racial) and has been singled out for unequal treatment on that basis; and (2) those involving challenges to laws or rules that supposedly draw irrational distinctions. *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). A third and more unusual claim involves "orchestrated campaigns of official harassment directed against [a plaintiff] out of sheer malice." *Id.* at 179. Olech contends that her Complaint belongs to this highly unusual class of equal protection claims.

In *Esmail*, a Naperville liquor dealer (Esmail) alleged that he was denied the renewal of his liquor license as a result of an “orchestrated campaign” by the mayor. Specifically, Esmail alleged that the mayor, who is also Naperville’s liquor control commissioner, not only denied his repeated applications for a liquor license, but also instituted a “campaign of vengeance” against him which consisted of causing the Naperville police to harass him and his employees with “constant, intrusive surveillance, in causing the police to stop his car repeatedly and forc[ing] him to undergo field sobriety tests, and in causing false criminal charges to be lodged against him.” *Id.* at 178. The court summarized that Esmail’s “charge here is that a powerful public official picked on a person out of sheer vindictiveness.” *Id.*

After reviewing Esmail’s 22-page Complaint, the Seventh Circuit declared that:

If the power of the government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court.

*Id.* at 179.

While this Court is sympathetic to alleged wrong suffered by Olech and her husband, the Court is not convinced that Olech’s Complaint describes the “malignant animosity” or the “orchestrated campaign of official harassment” complained of in *Esmail*. Even accepting Olech’s allegations that her state-court action generated “ill will” in Willowbrook against her and her neighbors, this Court is unable to conclude that the Village ever

“harassed” or “picked on” Olech and her neighbors “out of sheer vindictiveness” as in *Esmail*. At most, Olech’s Complaint alleges that the Village acted unreasonably and out of “ill will” in requiring her to give up an extra 18 feet of easement space that was not required of other property holders. This hardly qualifies as the same type of conduct alleged to have been suffered in *Esmail*. Moreover, based on the allegations contained in Olech’s Complaint, it appears that the reason that the Village wanted 33 feet of easement rather than 15 feet of easement was so that it would be able to install a paved public-roadway along Tennessee Avenue with sidewalks and public utilities – something it apparently could not do without the additional 18 feet of space. (Compl. at ¶ 25.) Nothing in Olech’s Complaint – apart from conclusory assertions – indicates that Willowbrook was acting out of vindictiveness or in retaliation for Olech’s prior lawsuit. See *Trask v. Rios*, 1995 WL 758410, at \*5 (N.D. Ill. Dec. 19, 1995) (“‘Harass,’ ‘discriminate,’ and ‘retaliate’ are words to which legal significance attaches. Alone, they are legal conclusions that do not place defendants on notice of the circumstances from which the accusations arise and therefore are inappropriate pleading devices.”); *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995) (“A complaint [that] consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6).”). Assuming that all of the allegations contained in Olech’s Complaint are true, it appears to this Court that there may be “ill will” on the part of both Willowbrook and Olech. Nevertheless, this

Court finds that the alleged treatment of Olech by Willowbrook and its officers – as well as the alleged motivation behind this treatment – is not sufficient to state an equal-protection claim under the standards as set forth in *Esmail*.

#### CONCLUSION

For the foregoing reasons, this Court grants Defendants' motion to dismiss.

ENTER:

/s/ George M. Marovich  
**GEORGE M. MAROVICH**  
**UNITED STATES DISTRICT**  
**COURT**

DATE: April 13, 1998

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**United States District Court**  
**Northern District of Illinois**  
**Eastern Division**

**OLECH**

**JUDGMENT IN A CIVIL CASE**

v.

**Case Number: 97 C 4935**

**VILLAGE OF WILLOWBROOK et al**

- [ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.
- Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** this action is dismissed in its entirety.

**Michael W. Dobbins,**  
**Clerk of Court**

/s/ J. Smith  
J. Smith, Deputy Clerk

Date: 4/13/98

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NO. 98-2235

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

GRACE OLECH, Plaintiff-Appellant,	) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
vs.	) Gen. No. 97 C 4935
VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of Defendant,	) Honorable George M. Marovich Judge Presiding
VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of Defendant, VILLAGE OF WILLOWBROOK,	)
Defendants-Appellees.	)

**BRIEF OF THE DEFENDANTS-APPELLEES**

NORTON, MANCINI, ARGENTATI,  
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109 North Hale Street, P.O. Box 846  
Wheaton, Illinois 60189-0846  
630/668-9440  
*Attorney for Defendants-Appellees*

*Of Counsel:*

James L. DeAno

**DEFENDANTS-APPELLEES'  
CERTIFICATE OF INTEREST**

(Received Jun. 12, 1998)

Appellate Court No: 98-2235

Short Caption: OLECH v. VILLAGE OF WILLOWBROOK, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.

- (1) The full name of every party or amicus the attorney represents in the case:  
VILLAGE OF WILLOWBROOK, an Illinois municipal corporation; GARY PRETZER, individually and as President of Defendant, VILLAGE OF WILLOWBROOK; and PHILIP J. MODAFF, individually and as Director of Public Services for the Defendant, VILLAGE OF WILLOWBROOK
- (2) If such party or amicus is a corporation:
  - i) Its parent corporation, if any; and  
None
  - ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:  
None
- (3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

NORTON, MANCINI, ARGENTATI, WEILER & DeANO,  
109 North Hale, P.O. Box 846, Wheaton, Illinois 60187 and  
111 West Washington Street, Suite 835, Chicago, Illinois  
and Dowd & Dowd, Ltd., 55 West Wacker Drive, Suite  
1000, Chicago, Illinois 60601

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in front [sic] of the table of contents of the party's main brief.

Attorney's Signature: /s/ James L. DeAno

Date: 6/11/98

Attorney's Printed Name: James L. DeAno  
Norton, Mancini, Argentati, Weiler & DeAno

Address: 109 North Hale, P.O. Box 846  
Wheaton, Illinois 60189-0846

Phone Number: 630/668-9440

#### CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with the type volume limitation of Circuit Rule 32(d)(2), contains 65,012 characters, and is formatted for WordPerfect 5.1 for DOS.

/s/ James L. DeAno  
 James L. DeAno  
 Attorney for  
 Defendants-Appellees

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## JURISDICTIONAL STATEMENT

The Appellees are satisfied that the jurisdictional statement submitted by the Appellant is complete and correct.

## STATEMENT OF THE CASE

### 1. Nature of the Case

This is an equal protection action brought by Plaintiff to recover for damages sustained as a result of a three-month delay in a project that connected the municipal water supply to her home. The Plaintiff has alleged that the Defendants delayed the water project because of Plaintiff's participation as a plaintiff in a separate lawsuit against the Village. The Plaintiff attempted to bring the cause of action pursuant to principles set forth by this Court in the case of *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), alleging that defendants violated the equal protection clause by singling her out as the object of their animosity.

### II. Course of Proceedings and Disposition Below

Plaintiff's original Complaint was dismissed and Defendants' Motion to Dismiss the First Amended Complaint was granted on April 13, 1998. Plaintiff filed a Notice of Appeal on May 13, 1998.

### III. Statement of Facts

The following facts are taken from the allegations of Plaintiff's First Amended Complaint. In the spring of

1995, the Defendant Village of Willowbrook developed a plan to require all homeowners along Tennessee Avenue to be connected to the municipal water supply system and the plan was to be implemented by the Spring of 1997. (Doc. 8, par. 18) The Plaintiff resided in the Village of Willowbrook along Tennessee Avenue which was a nondedicated and unimproved road. (Doc. 8, par. 22) In the Spring of 1995, Plaintiff's well broke down and in May of 1995 Plaintiff requested that the Village connect her home to the municipal water system "right away." (Doc. 8, pars. 15, 19) As part of the water extension project, the Village desired to dedicate Tennessee Avenue and improve it with pavement, sidewalks and public utilities. (Doc. 8, par. 25) To fully improve the road, the Village requested from the Plaintiff in August and September, 1995, a thirty-three-foot easement on land owned by Plaintiff abutting Tennessee Avenue. (Doc. 8, pars. 23, 25) The Plaintiff objected to providing a thirty-three-foot easement and in November of 1995, the Village agreed to require a fifteen-foot easement and a temporary construction easement of an additional five feet for the water extension project. (Doc. 8, par. 26) The project was completed and water was delivered to Plaintiff's home in March of 1996, a full year ahead of its projected Spring, 1997, completion date. (Doc. 8, pars. 17, 34)

The Plaintiff's Amended Complaint does not allege that any other Village residents who lived adjacent to non-dedicated unimproved roads were not asked for thirty-three-foot easements to improve the roads as a condition of the delivery of public water. Nor does the Amended Complaint allege that Tennessee Avenue was

ultimately dedicated or improved as part of the water connection project.

#### **IV. Allegations of Amended Complaint**

Defendants agree that Plaintiff's "recitation of facts" accurately sets forth the allegations of Plaintiff's First Amended Complaint. As set forth more fully in Defendants' argument, however, Defendants disagree with the legal and factual conclusions set forth in the Plaintiff's First Amended Complaint.

#### **SUMMARY OF ARGUMENT**

The Plaintiff's First Amended Complaint fails to state a cause of action for a violation of equal protection under the principles set out in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). The Complaint fails to allege actions by the Defendants that amount to the type of orchestrated campaign of official harassment found in *Esmail*. At worst, Defendants' conduct delayed the delivery of municipal water to Plaintiff's home by approximately three months. In addition, Defendants' actions were motivated by the legitimate government objective of fully improving the road adjacent to Plaintiff's home with pavement, sidewalks and public utilities. *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179 (7th Cir. 1996); and *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). Moreover, the Plaintiff's initial deprivation of water was attributable to the break down of her well, not to any conduct on the part of the Defendants. Even the subsequent three-month delay in the project would not have

deprived Plaintiff of water had her alternative source of water not failed. Again, the failure of the alternative water source cannot be attributed to the conduct of the Defendants.

Finally, Plaintiff has failed to allege that others similarly situated were treated any differently than she. *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992); *Garcia v. State of New Mexico Office of the Treasurer*, (D.N.M. 1997) 959 F.Supp. 1426.

## ARGUMENT

### I. Plaintiff's First Amended Complaint Fails to State a Cause of Action Under Principles Set Forth in the Case of *Esmail v. Macrane*

Plaintiff has attempted to state a cause of action for a violation of equal protection based upon principles set out by this Court in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). This cause of action stems from the equal protection clause's "last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives." 53 F.3d at 180. It is rooted in governmental conduct that is malicious, unrelenting, motivated by "malignant animosity," and "wholly unrelated to a legitimate public objective." *Esmail v. Macrane*, 53 F.3d 176, 179-80 (7th Cir. 1995); *Sarantakis v. Village of Winthrop Harbor*, (N.D.Ill. 1997) 969 F.Supp. 1095 (plaintiff must demonstrate malice on the part of the governmental entity). The standard for governmental conduct established by Esmail requires proof of an orchestrated campaign of official harassment aimed at doing significant

injury to a harmless plaintiff. Plaintiff's burden, according to *Esmail*, is to prove that the defendants' actions reflected a spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective.

The necessary components of the cause of action can be gleaned from the following statements in *Esmail*:

In particular, *Esmail* is not complaining merely that equally or more guilty liquor licensees than he are treated more leniently. He is complaining about an **orchestrated campaign of official harassment** directed against him out of sheer malice. 53 F.3d 176 at 179 (emphasis added).

\* \* \*

What it (the equal protection clause) does require, and what *Esmail* may or may not be able to prove, is that the action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons **wholly unrelated to any legitimate state objective**. 53 F.3d at 180 (emphasis added).

\* \* \*

If the power of government is brought to bear on a **harmless individual** merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court. 53 F.3d at 179 (emphasis added).

Thus, the cause of action requires (1) an orchestrated campaign of official harassment (2) directed at a "harmless" individual and (3) wholly unrelated to any legitimate state objective.

#### A. Plaintiff's Allegations Do Not Demonstrate an Orchestrated Campaign of Official Harassment

In *Esmail*, the "orchestrated campaign of official harassment directed against [plaintiff] out of sheer malice" was characterized as a "campaign of vengeance." This campaign included attempts to deny the plaintiff his liquor license as well as efforts to harass plaintiff and his employees with constant intrusive surveillance, repeated police stops during which the plaintiff was forced to undergo field sobriety tests and in the filing of false criminal charges against plaintiff. 53 F.3d at 178.

In this case, however, rather than demonstrating that Defendants attempted to "get" the Plaintiff, the Amended Complaint reveals that Defendants initially, and for a short time, sought an easement of sufficient width to improve a roadway with pavement, sidewalks and public utilities. Such improvements would benefit residents, including the Plaintiff, much more than they would benefit the government. Plaintiff, apparently not desirous of such improvements, objected to the thirty-three-foot easement, but ultimately agreed to a fifteen-foot easement, and another five-foot temporary construction easement. Defendants' conduct in this regard was hardly an orchestrated campaign of harassment, or an effort to "get" the Plaintiff, but merely a legitimate effort to improve a road obviously used by the Plaintiff with great frequency. *Esmail* is distinguishable in that the defendant there had no such public improvement or purpose in mind when attempting to deprive the plaintiff of his business license.

The Village's lack of malice and intent to harass is evidenced by the fact that it abandoned its initial request

within three months and agreed to a permanent easement of fifteen feet and a temporary easement of five feet and completed the water extension project within nine months of Plaintiff's request and a full year before the project was projected to be implemented. The initial thirty-three-foot easement request was part of a legitimate attempt to improve Tennessee Avenue and therefore cannot amount to a denial of equal protection. In *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179 (7th Cir. 1996), the court reasoned that even though a class can consist of a single member, the plaintiff must still demonstrate the defendant's conduct to be irrational and arbitrary.

At worst, Plaintiff's allegations show that the Plaintiff was a random victim of governmental error; the Village initially asked the Plaintiff for a thirty-three-foot easement, but later obtained advice from counsel that a total of twenty feet of easement would suffice. (Doc. 8, par. 26). A claim for violation of equal protection will not lie where the governmental action was taken out of error, neglect or mistake. *Ciechon v. City of Chicago*, 686 F.2d 511, 523 (7th Cir. 1982); *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497. Although a plaintiff can be a member of a class of limited membership, the plaintiff must have been singled out because of his membership in that class and not be just the random victim of governmental incompetence. *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), aff'd 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). To give rise to a constitutional grievance, the government conduct must be rooted in design and not derived merely from error or fallible judgment.

*Hamlyn v. Rock Island County Metropolitan Mass Transit District*, (C.D.Ill. 1997) 986 F.Supp. 1126, 1133.

#### B. Defendants' Actions Were Related to a Legitimate State Objective

This court explained in *Esmail* that the equal protection clause does not require government to treat all identically-situated individuals identically, but prohibits unequal treatment which is solely the result of vindictiveness. Thus, unequal treatment does not necessarily violate the equal protection clause, except when the distinctive treatment has no rational relation to a legitimate government interest. *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179, 1182 (7th Cir. 1996) (unequal treatment of similar persons does not offend the equal protection clause where a rational basis for the government action exists).

Plaintiff claims that the Defendants created a class of one by singling her out for disparate treatment. Where the government is alleged to have made such a "classification," it is entitled to a presumption that its classification is rational and constitutional. *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). To overcome this presumption of rationality, the plaintiff must establish in his complaint that the facts which formed the basis of the classification could not reasonably be conceived to be true by the governmental decision-maker. *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). Where a rational basis for the government conduct

emerges from the allegations of the complaint, the complaint cannot survive a motion to dismiss. *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992).

Here, the allegations of Plaintiff's Amended Complaint reveal there to be a rational basis for Defendants' conduct. The desire to extend and improve the infrastructure of the road in conjunction with the installation of the water delivery system was certainly a legitimate government objective. In *Esmail*, the sole objective was to deprive the plaintiff of his license. Here, it is clear that it was not the government's sole objective to deprive Plaintiff of water. The Plaintiff did receive the water, albeit not "right away." The delay in completing the water delivery system was attributable to legitimate government efforts to improve the road with pavement, sidewalks and public utilities in conjunction with the water extension project.

Though Plaintiff attempts to draw the inference that her alleged unequal treatment was due to her status as a claimant against the Village in another lawsuit, that conclusion does not logically follow from the allegations of the Amended Complaint. The Amended Complaint pleads a rational basis for Defendants' conduct; the desire to improve a street used by the Plaintiff in conjunction with the installation of a water main under that street. *Esmail* recognizes that the state's act of singling out an individual for differential treatment does not itself give rise to the cause of action. It is the malicious and spiteful motivation that forms the basis of the cause of action. Even if such improper motivation is alleged, the cause of action does not survive a motion to dismiss where, as here, a legitimate motivation for the governmental action exists.

### C. Plaintiff's Loss Was Not Caused Solely by Defendants' Conduct

In *Esmail*, the court found it significant that plaintiff's loss was brought on by the defendant's conduct alone. The court characterized the plaintiff as a "harmless individual" whose treatment was "the result solely of a vindictive campaign by the mayor." 53 F.3d at 179. In *Indiana State Teachers Association*, the court followed this reasoning, noting that the plaintiff must be "hapless." 101 F.3d at 1082. Here, however, the Plaintiff cannot be said to be "harmless" or "hapless" with respect to her lack of water. Plaintiff approached the Village with her request for water only after her independent source of water failed her. It is not apparent from the Amended Complaint that Plaintiff exhausted all reasonable attempts to repair her well or devise a new method of water delivery from her neighbor. Thus, irrespective of any attempts by the Village to acquire sufficient land to properly improve the road, Plaintiff cannot claim that her loss of water was due solely to the conduct of the Village. Plaintiff's deprivation of running water was merely incidental to the entire process and can hardly be deemed the objective of the Village. Plaintiff's Amended Complaint admits that the plan to connect the homeowners on Tennessee Avenue to the municipal water supply system was developed in the Spring of 1995 and was to be implemented within two years, or by the Spring of 1997. (Doc. 8, par. 18). Yet, Plaintiff admits that she received water when the project was completed on or about March 19, 1996, a full year ahead of schedule. (Doc. 8, par. 34).

There is no suggestion in Plaintiff's Amended Complaint that the project was intended to be or could have been completed by November of 1995 when Plaintiff's hose froze. Plaintiff cites no law, custom, practice or precedent to suggest that the project should, would or could have provided public water service to the Plaintiff by November of 1995, even if the thirty-three-foot easement had never been sought. Nor is the provision of governmental services or aid a constitutionally-protected affirmative right. *Sarantakis v. Village of Winthrop Harbor*, (N.D.Ill. 1997) 969 F.Supp. 1095, 1105. Indeed, the constitution confers no affirmative right to governmental aid or services, even where such may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual. See *Sarantakis v. Village of Winthrop Harbor*, (N.D.Ill. 1997) 969 F.Supp. 1095 at 1105.

*Sarantakis* is also noteworthy because it, like the instant case, involved the denial of governmental services, as opposed to the refusal of a business license at issue in *Esmail*. *Sarantakis* holds that where the claim involves the denial of governmental services, the equal protection claim must be based upon discrimination directed at groups, rather than individuals. 969 F.Supp at 1105. It is submitted by Defendants that *Sarantakis*, rather than *Esmail*, controls this case and Plaintiff's alleged "classification of one" does not state a claim for equal protection. Indeed, the *Esmail* doctrine has not been accepted at all in the Fourth or Sixth Circuits. *Edwards v. City of Goldsboro*, (E.D.N.C. 1997) 981 F.Supp. 406, 410; *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996);

and *Dubuc v. Green Oak Township*, 958 F.Supp. 1231, 1236-37 (E.D.Mich. 1997).

## **II. Plaintiff Has Not Alleged That Similarly-Situated Individuals Were Treated Differently**

This third kind of equal protection claim, recognized by *Esmail*, must still be supported by factual allegations that similarly-situated individuals were treated differently. *Esmail* noted that the "distinctive feature" of this type of claim was that plaintiff's **unequal treatment** was alleged to have been the result solely of a vindictive campaign by the mayor. 53 F.3d at 179 (emphasis added). The plaintiff in *Esmail* alleged that other liquor license applicants were not subjected to the same harassment as he.

In *Wroblewski v. City of Washburn*, 965 F.2d 452 (7th Cir. 1992), the plaintiff alleged that he was singled out by the defendant city for unfair treatment with respect to the operation of his business, a marina. In dismissing the equal protection claim, the court noted that even though the plaintiff alleged that he was singled out for this unfair treatment, he failed to identify any individual or group situated similarly to himself. The lack of such an allegation was deemed fatal to the equal protection claim and its dismissal was affirmed. 965 F.2d 452, 459.

In *Garcia v. State of New Mexico Office of the Treasurer*, (D.N.M. 1997) 959 F.Supp. 1426, a public employee alleged that the defendant violated the equal protection clause in terminating him for allegedly soliciting a bribe. The district court dismissed the claim, noting that even

when malignant animosity motivated governmental officials to bring to bear the power of government on a harmless individual, the plaintiff must allege that similarly-situated individuals were treated differently. 959 F.Supp. at 1432-33. This requirement is satisfied, the court noted, only where the plaintiff supports the complaint with well-pleaded facts demonstrating the differential treatment of similar individuals. 959 F.Supp. at 1434. The court noted that although the plaintiff therein stated that he was treated in a "manner disparate" from other employees, such conclusory allegations were insufficient to state a claim upon which relief could be granted. The plaintiff's complaint was dismissed because he failed to allege that other employees who had been accused of bribery or some similarly serious charge were not discharged.

In *O'Connor v. Chicago Transit Authority*, 985 F.2d 1362 (7th Cir. 1993), an employee of the Chicago Transit Authority with a record of insubordination brought an equal protection claim asserting that his termination resulted from his whistle-blowing activity. Summary judgment for the defendant was affirmed, with the court noting that the plaintiff failed to demonstrate that another grossly insubordinate worker was treated differently than he.

In *Gaylor v. Thompson*, (W.D. Wis. 1996) 939 F.Supp. 1363, the plaintiffs applied for a display permit and alleged that they were denied equal protection because the governor directly engaged himself in the process, as he had done in no other case, and denied plaintiffs' application because of their views on the separation of church and state. Plaintiffs' failure to demonstrate how

they were similarly situated to previous applicants or that they were the only ones treated differently than previous applicants resulted in dismissal of their claim.

*Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), is distinguishable because the plaintiff therein could identify a similarly-situated person who was treated differently by the defendant. The plaintiff was a female paramedic who was discharged by her employer because of her alleged failure to render proper treatment during an ambulance transport of a patient. The plaintiff's co-worker, a male, was not disciplined, though he was equally responsible for the negligent treatment of the patient in question.

In *Ziegler v. Jackson*, 638 F.2d 776 (5th Cir. 1981), cited by *Esmail*, the governmental entity deprived the plaintiff of employment because of his convictions for presenting a fire arm and criminal provocation, while it retained other public employees convicted of similar offenses. The plaintiff therein could point to persons and circumstances identical to his own wherein the treatment was different.

Plaintiff's residence adjacent to a non-dedicated road is a unique fact that contradicts any claim that others who sought connection to the public water supply were similarly situated. The Amended Complaint alleges that Plaintiff requested a connection to the public water supply "right away" after her well broke down. (Doc. 8, par. 19). The Plaintiff does not allege that any other residents who lived adjacent to such non-dedicated roads received public water "right away" after making a request or that the Village did not initially attempt to obtain easements of sufficient width to improve the road with pavement,

sidewalks and public utilities as part of the water connection project. The Amended Complaint does not allege that the law required that Plaintiff's home be connected to the public water supply "right away" or that every other resident that ever made a request for public water service received that water "right away" or within three months or six months or nine months.

The Plaintiff alleges that Defendants' request for a thirty-three-foot easement was made in August and again in September, but that by November 10, 1995, the Village agreed that a fifteen-foot easement along with a five-foot temporary construction easement would suffice for the installation of the water main. The portion of the Village Attorney's letter cited in paragraph 26 of Plaintiff's Amended Complaint is vague and does not suggest that Plaintiff was treated any differently than similarly-situated residents. The letter states that the requirement of a fifteen-foot easement and a five-foot temporary construction easement was consistent with Village policy regarding "all other property" (emphasis added); this does not mean that other residents who lived adjacent to non-dedicated roads over which the governmental body had no easement were granted a water connection without a request for a thirty-three-foot easement. Rather, the language cited by the Plaintiff is more reasonably construed to mean that with respect to property "other" than Plaintiff's, i.e., where the residents seeking water were living adjacent to a dedicated and fully improved road, fifteen-foot permanent and five-foot construction easements were sought by the Village.

### **III. Defendants' Conduct Was Not the Cause of Plaintiff's Injury**

Because this action is brought pursuant to §1983, the Plaintiff is obligated to show that her injury would not have occurred but for Defendants' conduct. As the court noted in *Button v. Harden*, 814 F.2d 382, 383 (7th Cir. 1987):

Section 1983 is a tort statute. To prevail under it, a plaintiff must show not only that his federal rights were violated but also that, had it not been for the violation, the injury of which he complains would not have occurred. Citing *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977); *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298, 302 (7th Cir. 1987).

This case can easily be distinguished from *Esmail* when focus is placed upon the ultimate cause of the Plaintiff's injury or deprivation. In *Esmail*, the defendant was solely responsible for the alleged harassment of plaintiff by police and the loss of his license to do business. Here, the loss or injury occurred before the Defendants had any opportunity to act. It was the Plaintiff who approached the Defendants after her well broke down and then complained when the Defendants did not act quickly enough to provide her with a new source of water. Thus, Defendants' conduct did not cause Plaintiff's loss of water.

### **CONCLUSION**

Plaintiff is asking this Court to scrutinize a decision to initially seek a thirty-three-foot easement for the improvement of a non-dedicated road as part of a project for the installation of a water main. Plaintiff's Amended Complaint supplies facts which demonstrate that this request was neither arbitrary nor irrational, and also fails to allege that similar requests for thirty-three-foot easements were not made when other residents requested the installation of a water main along a non-dedicated road. Moreover, the Plaintiff's loss of water was the result of her well breaking down and a hose freezing, not the result of governmental conduct. The extension of the principles which govern the *Esmail* decision to the facts set forth in Plaintiff's Amended Complaint herein would trivialize the equal protection clause. *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996) (the concept of equal protection is trivialized when it is used to subject every decision made by a local government to constitutional review by federal courts).

WHEREFORE, in light of the foregoing, Defendants pray that this Court will enter its Order affirming the Order of the district court dismissing Plaintiff's First Amended Complaint with prejudice.

Respectfully submitted,  
**NORTON, MANCINI,  
ARGENTATI, WEILER & DeANO**

By: /s/ James L. DeAno  
James L. DeAno  
Attorney for  
Defendants-Appellees

NO. 98-2235

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

GRACE OLECH,	)	Appeal from the United
Plaintiff-Appellant,	)	States District Court for
-vs-	)	the Northern District of
VILLAGE OF	)	Illinois, Eastern
WILLOWBROOK, an	)	Division.
Illinois municipal	)	
corporation, GARY	)	
PRETZER, individually	)	
and as President of	)	
Defendant VILLAGE OF	)	
WILLOWBROOK, and	)	
PHILIP J. MODAFF,	)	
individually and as	)	
Director of Public Services	)	
of Defendant VILLAGE	)	
OF WILLOWBROOK,	)	
Defendants-Appellees.	)	

REPLY BRIEF OF  
PLAINTIFF-APPELLANT GRACE OLECH

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### STATEMENT OF FACTS

The Statement Of The Case portion of the brief filed on behalf of Willowbrook and its officials (hereinafter sometimes referred to collectively as "Willowbrook") is misleading insofar as it implies that the plan developed by Willowbrook by the spring of 1995, which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to the municipal water system of Willowbrook, to hook up to the system, contemplated a dedication of Tennessee Avenue, and insofar as it implies that the homes of Howard Brinkman, Grace Olech, and the Zimmers were hooked up pursuant to that plan. (Willowbrook's brief, p. 6.) The only reference to Willowbrook's plan in the Amended Complaint is in paragraph 18 where it is alleged that by the spring of 1995 Willowbrook had developed a plan, which was to be implemented within two years of the spring of 1995, and which was going to require all of the homeowners on Tennessee Avenue, who were not hooked up to the municipal water supply system, to hook up to the system. (Appendix 6.) This allegation explains why the Olechs did not drill a new well when, in the spring of 1995, their well broke down and was beyond repair because they were going to have to hook up within two years anyway. But the Amended Complaint does not allege that Willowbrook's plan contemplated a dedicated street, or that the homes of Brinkman, Olech, and the Zimmers were hooked up pursuant to Willowbrook's plan. (In fact, if Willowbrook's plan had included dedication of the street, it would have required Willowbrook to pay the property owners for the easement rights involved because private property may not be taken for public purposes without

just compensation. (United States constitution, amendment 5.) The issue of a street dedication did not come up until shortly after Howard Brinkman, Grace Olech, and the Zimmers, the plaintiffs in the state court lawsuit, notified Willowbrook of the Olechs' problem and requested that their homes be hooked up right away. (Appendix 6-7) In its brief Willowbrook refers to "[t]he project['s] . . . projected Spring, 1997, completion date." As noted above, the homes of Brinkman, Olech, and the Zimmers were not hooked up pursuant to Willowbrook's plan. Brinkman, the Olechs, and the Zimmers requested the extension of the water main right away in the spring of 1995, and the homeowners, themselves, paid for the project. (Appendix 6-7) There was never any projected spring 1997 completion date for the project that Brinkman, the Olechs, and the Zimmers paid for.

Finally, it should be noted that Willowbrook incorrectly stated that "Plaintiff's original Complaint was dismissed." (Willowbrook's brief, p. 5.) That statement is not true. Mrs. Olech elected to file an Amended Complaint rather than [sic] to brief the motion to dismiss the original Complaint. (Doc. 7)

### ARGUMENT

The District Court erred in dismissing Grace Olech's Amended Complaint because the Amended Complaint states a claim under 42 U.S.C §1983 for violation of her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States constitution under the principles of this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), and because the plaintiff has not "pled herself out of an action" by alleging that other homeowners were asked to grant a 33-foot easement.

In her initial brief, Grace Olech maintained that her Amended Complaint properly set forth a claim under 42 U.S.C. §1983 for violation of her rights under the Equal Protection Clause pursuant to this Court's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). Mrs. Olech maintained that she was required to plead unequal treatment resulting from vindictiveness, animosity, or other improper purpose of the governmental officials involved, and that her Amended Complaint set forth those elements.

In response, Willowbrook first argues that the Amended Complaint is insufficient because it does "[n]ot [d]emonstrate an [o]rchestrated [c]ampaign of [o]fficial [h]arassment." (Willowbrook's brief, pp. 10-12.) Grace Olech explained in her original brief why it is not necessary to plead "an orchestrated campaign of official harassment" as long as the complaint alleges unequal treatment resulting from vindictiveness, animosity, or other improper purpose of the governmental officials involved (Olech's brief, pp. 19-20), and that discussion

will not be repeated here. Several remarks made by Willowbrook in connection with its discussion of the concept of "an orchestrated campaign of official harassment" should, however, be addressed.

Willowbrook has stated as follows:

" . . . Defendants initially, and for a short time, sought an easement of sufficient width to improve a roadway with pavement, sidewalks and public utilities. Such improvements would benefit residents, including the Plaintiff, much more than they would benefit the government."

(Willowbrook's brief, p. 10.)

Willowbrook has included this language in an attempt to convince this Court that it was not trying to "get" Mrs. Olech, but that it was trying to "benefit" her. It is not a "benefit" to a property owner, however, for the government to take property from him, for a road or other public purpose, without paying him just compensation for it (see United States constitution, amendment 5), nor is it a "benefit" to a property owner for the government to demand property rights from him as a condition of receiving running water, which the government does not demand of others as a condition of receiving running water. It is especially not a "benefit" to a property owner for the government to attempt to obtain property rights from him in this way because of ill will generated by litigation and in an attempt by the government "to control stormwater drainage in the vicinity to the detriment" of the property owner "by the use of ditches and swales" as alleged in the Amended Complaint. (Appendix 8) Willowbrook's argument that it was trying to "benefit" Mrs. Olech is contradicted by the allegations of the Amended

Complaint which must, of course, be accepted as true at this stage of the proceedings. *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

Willowbrook also stated that “[t]he Village’s lack of malice and intent to harass is evidenced by the fact that it abandoned its initial request within three months.” (Willowbrook’s brief, p. 11.) Willowbrook’s statement in this regard might be a good closing argument for its lawyer to make to the jury, but it has no place in connection with a motion to dismiss under Rule 12(b)(6). The Amended Complaint alleges that Willowbrook treated Brinkman, the Olechs, and the Zimmers differently from other property owners in the village “because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity to the detriment of Plaintiff GRACE OLECH and Thaddeus Olech, and other plaintiffs in the state court lawsuit, by the use of ditches and swales along Tennessee Avenue.” (Appendix 8) This allegation must be accepted as true, and Willowbrook cannot argue in connection with a Rule 12(b)(6) motion that there is evidence that it is not true. In any event, the fact that Willowbrook ultimately relented when it was threatened with legal action does not evidence a lack of malice or intent to harass.

Willowbrook has also stated that it completed the water extension project “a full year before the project was projected to be implemented.” (Willowbrook’s brief, p. 11.) This statement is incorrect as explained in the Statement Of Facts portion of this reply brief.

Willowbrook has also stated that, “[a]t worst, Plaintiff’s allegations show that the Plaintiff was a random

victim of governmental error,” and that the government’s conduct was not “rooted in design.” (Willowbrook’s brief, pp. 11-12.) Again, this argument by Willowbrook is contradicted by the allegations of the Amended Complaint to the effect that Willowbrook’s actions were “rooted in design” (Par. 27), and this argument is not a proper one to make in connection with a Rule 12(b)(6) motion to dismiss.

Willowbrook’s second argument is that the Amended Complaint is insufficient because “[d]efendant’s [a]ctions [w]ere [r]elated to a [l]egitimate [s]tate [o]bjective.” (Willowbrook’s brief, p. 12-13.) Willowbrook has waived this argument. Willowbrook’s Motion To Dismiss Plaintiff’s Amended Complaint (Appendix 12-13) incorporated by reference a Memorandum Of Law In Support Of Motion To Dismiss. (Appendix 14-22) In the motion and memorandum, Willowbrook presented only two arguments in support of its request for dismissal under Rule 12(b)(6). First, Willowbrook argued that the Amended Complaint did not allege a violation of the Equal Protection Clause pursuant to this Court’s decision in *Esmail v. Macrane*, 53 F.2d 176 (7th Cir. 1995), because the Amended Complaint “[l]acks [s]ufficient [a]llegations of [m]alice on the [p]art of the [d]efendants.” (Appendix 20-21) Willowbrook also argued that Mrs. Olech had “[p]led [h]erself [o]ut of an [a]ction [b]y [a]lleging that [o]ther [h]omeowners [w]ere [a]sked to [g]rant a 33-foot [e]asement.” (Appendix 21-22) Willowbrook did not argue that the Amended Complaint was insufficient because defendant’s actions were related to a legitimate state objective. Willowbrook cannot raise this contention for the first time on appeal (see *Coulter v. Vitale*, 882 F.2d 1286, 1289 (7th Cir. 1989)), especially

where, as here, if the argument had merit and had been properly raised, Mrs. Olech could have sought to amend her complaint to correct any related defect.

Even if Willowbrook had not waived this argument, it would have been unavailing to Willowbrook. The allegations of the Amended Complaint set forth Willowbrook's objective or motivation for its conduct, and that objective was not legitimate. It is not a legitimate government objective to take property from its owner without paying for it (United States constitution, amendment 5), nor, as a result of ill will, to demand property rights from him as a condition of receiving running water, which the government does not demand of others as a condition of receiving running water. Nor is it a legitimate government objective to attempt to extort property rights from a homeowner, who has sued the government for flooding his property with stormwater, in an attempt by the government to use those property rights to control stormwater in the vicinity of the homeowner to his detriment by the use of ditches and swales as alleged in the Amended Complaint. (Par. 27) (See *Esmail*.) Willowbrook's argument in this regard is simply another attempt to contradict the allegations of the Amended Complaint which, as noted above, is inappropriate at this stage of the proceedings. In *Esmail*, the government could have argued that it had a legitimate state objective in denying the plaintiff's liquor license applications, i.e., to protect the public from liquor dealers who had violated the law. Such an argument would have been unavailing there in light of the allegations of the complaint, and it is equally unavailing here. The case of *Wroblewski v. City of Washburn*, 965 F.2d 452 (7th Cir.

1992), cited by Willowbrook, is readily distinguishable. In that case the facts alleged in the plaintiff's complaint, itself, established that the government had a rational and legitimate basis for its conduct, i.e., to "no longer do business with someone with whom it had been associated in a losing financial arrangement." (965 F.2d 452, 460.) In the case under review, as in *Esmail* (53 F.3d 176, 179), the complaint establishes that the government's objective was not legitimate.

Willowbrook's next argument is that "[p]laintiff's [l]oss [w]as [n]ot [c]aused [s]olely by [d]efendant's [c]onduct." (Willowbrook's brief, p. 14-15.) Actually, Willowbrook has argued causation twice, in its argument IC and its argument III. Willowbrook has waived this argument as well because it did not appear in Willowbrook's Motion To Dismiss Plaintiff's Amended Complaint (Appendix 12-13) or Willowbrook's Memorandum Of Law In Support Of Motion To Dismiss (Appendix 14-22). This argument is in the record on appeal, but it first appears in the Reply filed by Willowbrook in support of its motion to dismiss the Amended Complaint. (Doc. 18, pp. 4-6) Arguments in support of a motion to dismiss not raised in the district court until the reply are deemed waived. (*Lockrey v. Leavitt Tube Employees' Profit Sharing Plan*, 748 F.Supp. 662, 667 (N.D.Ill. 1990).) And a party cannot raise an issue on appeal unless it is raised in a meaningful way below. *Coulter v. Vitale*, 882 F.2d 1286, 1289 (7th Cir. 1989).

Even if this argument had not been waived, it would not be of any help to Willowbrook. The Amended Complaint alleged that Willowbrook's illegal demands were the cause of Mrs. Olech's injury. The Amended Complaint

alleged that from the time Modaff first demanded the 33-foot easements in August of 1995 until Willowbrook withdrew its illegal demands on November 10, 1995, no progress was made on the project (Appendix 9), and that the initial refusal of the defendants to proceed with the project unless Willowbrook was granted 33-foot easements and a 66-foot street dedication resulted in a delay in the project of approximately three months, "a delay which proved critical as a result of the approaching winter weather." (Appendix 9) The Amended Complaint alleges that in November of 1995, the overground hose used by the Olechs to connect to their neighbors' well froze, and, therefore, the Olechs were without running water from November of 1995 until the project was completed [sic] on March 19, 1996. (Appendix 9-10) Finally, the Amended Complaint alleged that the Olechs were without running water during the winter of 1995-1996 and suffered great inconvenience, humiliation, and mental and physical distress "as a proximate result of the three-month delay in the project caused by the initial refusal of the Defendants to proceed with the project unless Defendant VILLAGE OF WILLOWBROOK was granted the 33-foot easements and the 66-foot street dedication." (Appendix 10) These allegations must be accepted as true in connection with the Rule 12(b)(6) motion. Clearly, the Amended Complaint adequately set [sic] forth causation.

In its brief, Willowbrook stated that "[i]t is not apparent from the Amended Complaint that Plaintiff exhausted all reasonable attempts to repair her well or devise a new method of water delivery from her neighbor." (Willowbrook's brief, p. 14.) This argument is specious. The Amended Complaint alleged that the well was broken

down and "was beyond repair" (Appendix 5), that the Olechs were going to be required by Willowbrook to hook up to the municipal water system by 1997 (Appendix 6), and that the method of water delivery from the neighbor was inadequate in the winter. (Appendix 6, 9-10) In fact, the Amended Complaint alleged that in May of 1995 Modaff was informed that the Olechs' temporary solution of the problem would not work in the winter when temperatures fell below freezing. (Appendix 6) Willowbrook again stated in connection with its argument on causation that the project was completed "a full year ahead of schedule." This statement is inaccurate for the reasons set forth in the Statement Of Facts herein. The case of *Sarantakis v. Village of Winthrop Harbor*, 969 F.Supp. 1095 (N.D.Ill. 1997), cited by Willowbrook in connection with its argument on causation, is of no help to Willowbrook. First, *Sarantakis* involved a motion for summary judgment, not a motion to dismiss under Rule 12(b)(6). Second, *Sarantakis* distinguished *Esmail* on the basis that the plaintiff had "not shown that defendant Commons acted with such malice as to violate any equal protection right," and not on the basis that *Esmail* does not apply in the context of government services. (969 F.Supp. 1095, 1105.) Finally, the case cited by *Sarantakis* for the proposition that discrimination based on individual, rather than [sic] group, reasons is insufficient, *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474 (7th Cir. 1990), involved, not the provision of government services, but the denial of building permits, which is analogous to the denial of liquor licenses in *Esmail*. There is no support for Willowbrook's argument that the type of equal protection

claim recognized in *Esmail* is restricted to unequal treatment in the denial of licenses or permits as opposed to unequal treatment in the provision of essential government services. And, as noted above, Willowbrook did not make this argument in its motion to dismiss in any case.

Willowbrook's final argument is that "[p]laintiff [h]as [n]ot [a]lleged [t]hat [s]imilarly-[s]ituated [i]ndividuals [w]ere [t]reated [d]ifferently" because, Willowbrook argues, the plaintiff resides on a non-dedicated street. (Willowbrook's brief, p. 15.) Willowbrook waived this argument by failing to raise it in the district court until its Reply. The waiver rule is especially appropriate with respect to this argument because, if the argument were valid and Willowbrook had raised it in connection with its motion to dismiss, Mrs. Olech could have sought to amend her complaint to correct any related defect.

In any event, Willowbrook's argument in this regard is unavailing to Willowbrook. The Amended Complaint alleges that Village Attorney admitted in a letter dated November 10, 1995:

"A fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding *all other property in the Village*." (Emphasis added.)

(Appendix 8)

Thus, the Village Attorney admitted that Brinkman, the Olechs, and the Zimmers were treated differently from the owners of "all other property in the Village," not just the owners of "all other property in the Village adjacent

to a dedicated streets [sic]." Moreover, the Amended Complaint alleges that Willowbrook treated Brinkman, the Olechs, and the Zimmers differently from other property owners "because of the ill will generated by the state court lawsuit and in an attempt to control stormwater drainage in the vicinity" to their detriment. (Appendix 8) It does not allege that they were treated differently because they lived on a nondedicated street. As noted above, the allegations of the Amended Complaint must be accepted as true.

The problem with Willowbrook's position in this case is that Willowbrook is attempting to dispute the allegations of Mrs. Olech's Amended Complaint in connection with a Rule 12(b)(6) motion. This it cannot do.

#### CONCLUSION

For the reasons stated herein and in her original brief, the plaintiff-appellant, Grace Olech, respectfully requests this Court to reverse the judgment entered by the district court dismissing this case, and to remand this cause for further proceedings consistent with this Court's opinion.

Respectfully submitted,  
 /s/ John R. Wimmer  
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In the  
 United States Court of Appeals  
 for the Seventh Circuit

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No. 98-2235

GRACE OLECH,

*Plaintiff-Appellant,*

v.

VILLAGE OF WILLOWBROOK, et al.,

*Defendants-Appellees.*

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Appeal from the United States District Court  
 for the Northern District of Illinois, Eastern Division.  
 No. 97 C 4935 – George M. Marovich, Judge.

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ARGUED OCTOBER 8, 1998 – DECIDED NOVEMBER 12, 1998

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Before POSNER, Chief Judge, and CUMMINGS and ESCHBACH,  
 Circuit Judges.

POSNER, Chief Judge. In *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), we held that the equal protection clause provides a remedy when “a powerful public official picked on a person out of sheer vindictiveness.” *Id.* at 178. Although the clause is more commonly invoked on behalf of a person who either belongs to a vulnerable minority or is harmed by an irrational difference in treatment, it can also be invoked, we held, by a person who can prove that “action taken by the state, whether in the

form of prosecution or otherwise, was a spiteful effort to ‘get’ him for reasons wholly unrelated to any legitimate state objective.” *Id.* at 180. See also *Indiana State Teachers Ass’n v. Board of School Commissioners*, 101 F.3d 1179, 1181-82 (7th Cir. 1996); *Ciechon v. City of Chicago*, 686 F.2d 511, 522-24 (7th Cir. 1982); *Batra v. Board of Regents*, 79 F.3d 717, 721-22 (8th Cir. 1996); *Yerardi’s Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen*, 932 F.2d 89, 94 (1st Cir. 1991); *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980). Grace Olech brought suit against the Village of Willowbrook and two of its high officials in reliance on *Esmail’s* principle and was tossed out on the defendants’ Rule 12(b)(6) motion on the ground that the facts pleaded in her complaint did not fit the mold of *Esmail*.

Olech and her husband, now deceased, used to get their water from a well on their property. But the well broke down and they asked the Village of Willowbrook, where their property is located, to connect their home to the municipal water system. The Village agreed, but besides requiring the Olechs to pay the cost of the hook up (which apparently is a standard requirement and one with which they complied without complaining) told them they would have to grant the Village not the customary 15-foot easement to enable servicing of the water main but a 33-foot easement to permit the Village to widen the road on which they live. The Olechs refused, and after three months the Village relented, acceded to the smaller easement, and hooked up the water. But meanwhile the Olechs had been without water and as a consequence suffered various types of damage for which they seek redress in this suit.

So far in our recitation of the allegations of the complaint there is nothing to suggest a denial of equal protection. But the complaint goes on to allege that the defendants' motivation for insisting on the nonstandard easement was the fact that the Olechs earlier had sued the Village, and obtained damages, for flood damage caused by the Village's negligent installation and enlargement of culverts located near the Olechs' property. See *Zimmer v. Village of Willowbrook*, 610 N.E.2d 709, 712 (Ill. App. 1993). The complaint alleges that the lawsuit generated "substantial ill will" that caused the Village to depart from its normal policy of demanding only a 15-foot easement in exchange for providing municipal water and instead to decide to pave over a chunk of the Olechs' property. A letter is cited in which the Village's lawyer conceded, after the Village had backed down and agreed to require only the 15-foot easement, that that easement "will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village." For three months the Olechs had been treated differently, to their detriment, from all other property owners in the Village only because their meritorious suit against the Village had angered Village officials. These are just allegations and may be false. But as the defendants acknowledge, we must assume they are true for purposes of this appeal. The defendants have yet to file an answer or any other pleading that denies any allegation of the complaint.

Nevertheless the district judge granted the defendants' motion to dismiss because the complaint didn't allege an "orchestrated campaign of official harassment" motivated by "sheer malice," quoting our opinion in

*Esmail*. 53 F.3d at 179. Nothing in the *Esmail* opinion, however, suggests a general requirement of "orchestration" in vindictive-action equal protection cases, let alone a legally significant distinction between "sheer malice" and "substantial ill will," if, as alleged here, the ill will is the sole cause for the action of which the plaintiff complains. *Esmail* was complaining that he had been denied liquor licenses on the basis of trivial infractions for which no other applicant had ever been denied a license. Standing by itself, this difference in treatment would not have been a denial of equal protection, but merely an example of uneven law enforcement, than which nothing is more common nor, in the usual case, constitutionally innocent. E.g., *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Esmail v. Macrane*, *supra*, 53 F.3d at 179; *Falls v. Town of Dyer*, 875 F.2d 146, 148-49 (7th Cir. 1989); *Hameetman v. City of Chicago*, 776 F.2d 636, 641 (7th Cir. 1985). The plaintiff had to and did allege that the denial of his applications was the result not of prosecutorial discretion honestly (even if ineptly – even if arbitrarily) exercised but of an illegitimate desire to "get" him because of lawful actions by him that had aroused the mayor's ire. It was in that context that we pointed out that the complaint alleged much more than uneven enforcement.

The present case is not one of uneven enforcement. The Village does not deny that it has a legal obligation to provide water to all its residents. If it refuses to perform this obligation for one of the residents, for no reason other than a baseless hatred, then it denies that resident the equal protection of the laws. And that is sufficiently alleged. While it may have been important in *Esmail* that the plaintiff alleged an "orchestrated campaign," it was

not important here. The district judge did not try to hook up the requirement of an "orchestrated campaign" to the language or policy of the equal protection clause, and we cannot think of any hook either. Nor is it important that the oppression of the plaintiff was merely temporary. Many temporary deprivations are actionable even under provisions of the Constitution that, unlike the equal protection clause, require that the deprivation be of liberty or property. E.g., *Connecticut v. Doebr*, 501 U.S. 1, 15 (1991); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987); *In re Special March 1981 Grand Jury*, 753 F.2d 575, 580 (7th Cir. 1985). And to be deprived of water for three months is a potentially more serious deprivation than many permanent deprivations that we can think of.

Of course we are troubled, as was the district judge, by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case. But bear in mind that the "vindictive action" class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant. If the defendant would have taken the complained-of action anyway, even if it didn't have the animus, the animus would not condemn the action; a tincture of ill will does not invalidate governmental action. Maybe the present case can be disposed of on this or some other ground well short of trial; it cannot be disposed of on the pleadings.

And especially not on the defendants' alternative ground, that their action was not the cause of the plaintiff's lacking water for three months. They point out that had her well not broken down, which is not contended to be their fault, she would have had an uninterrupted supply of water no matter what the Village failed to do. This is a ridiculous argument. It is like saying that if she didn't live in the Village of Willowbrook she wouldn't (in all likelihood) have had a water problem. That is blaming the victim with a vengeance. Every injury has a multitude of antecedent conditions. When one of them is the defendant's culpable fault, he is not excused from liability on the ground that if some other, innocent condition hadn't been present (such as Columbus's discovery of America) no injury would have occurred. E.g., *Movitz v. First National Bank*, 148 F.3d 760, 762 (7th Cir. 1998); *United States v. Feliciano*, 45 F.3d 1070, 1075 (7th Cir. 1995); *Milam v. State Farm Mutual Automobile Ins. Co.*, 972 F.2d 166, 169 (7th Cir. 1992).

REVERSED.  
No. 98-2235

A true Copy:

Teste:

/s/ \_\_\_\_\_  
Clerk of the United States Court of  
Appeals for the Seventh Circuit